1953

Utah Copper v. Hays Estate : Reply Brief

Utah Supreme Court

In the Supreme Court of the State of Utah

UTAH COPPER COMPANY, a corporation,
Plaintiff and Respondent,

vs.

STEPHEN HAYS ESTATE, INC., a corporation of Utah, JULIA HAYS HOGE, STEPHEN J. HAYS, LAWRENCE J. HAYS, MRS. LOU GOREY, MRS. ETHEL V. REILLEY and MARY LOUISE O'DONNELL,
Defendants and Appellants.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

THE ISSUE

Plaintiff is under the strange obsession that plaintiff by a declaration of "plaintiff's purpose" in capturing waters in Tract C has in some way solved the issues in this case. It makes not one whit of difference what plaintiff may declare its purpose to be. It may be that plaintiff has hynotized itself as to the nature of its purpose, but the *purpose* of law suits and courts is to find out what the real effect of claims and conduct is and not

what the declared purpose of one of the litigants is. Plaintiff's purpose is to capture waters in catchment C. As to this there can be no dispute. If the waters belong to the defendant, plaintiff admits that plaintiff has no lawful means by which plaintiff may be permitted to take the waters in Tract C. Both plaintiff and defendant claim these same waters. Plaintiff admits that if the order of occupancy entered on June 13, 1928, and expressly made "without prejudice" and only "pending the action" had not been entered plaintiff could not have captured these waters in Tract C, not because plaintiff would have been a trespasser but because the waters (those that had been in the dump) would have passed from plaintiff's ownership when they entered the land of the defendant. The order is the only new and determinative incident in the situation on which plaintiff relies. Did the order of June 13, 1928, by which plaintiff was permitted "pending the action" and "without prejudice" to enter upon the land of the defendant and capture the waters which otherwise are admitted to have belonged to the defendant, change the ownership of the waters back to the plaintiff? If it did, the order was not "without prejudice" but destructive of defendant's ownership. Plaintiff contends that plaintiff became the owner of the waters ("continued to be owner", plaintiff phrases it, but plaintiff cannot continue to be what plaintiff never was—OWNER OF WATER IN TRACT C) by reason of the order; defendant contends that such a result is not possible under the statute, but that if it is possible plaintiff must pay defendant for the copper

solutions which plaintiff will take. This plaintiff refuses to do.

Plaintiff has an idea that while Tract C had a valuable water right appurtenant to that tract on June 12, 1928, the day before the order was entered, that the valuable water right was lost by some legal hokus-pokus on June 13, 1928, by the entry of the order of occupancy "pending the action" and "without prejudice". This law suit is to determine whether the order had the effect claimed by the plaintiff or was in fact entered, as it expressly provided, "without prejudice" and only "pending the action".

General Ben Butler is given credit for having stated that the law is "that which is confidently stated and stoutly maintained". Apparently counsel for plaintiff feel that this is not only a good policy with reference to the law, regardless of what the cases may hold, but is particularly applicable to facts. A reading of respondent's brief is surprising, to say the least, with reference to some statements therein contained. We will, therefore, at the outset of this reply, call attention of the court to a few statements of counsel before proceeding to consider the argument.

WHO OWNS THE FEE OF THE BINGHAM & GARFIELD RIGHT OF WAY?

On page 3, wherein plaintiff seeks to give this court a statement of the facts, plaintiff states that almost the whole of the surface area between plaintiff's dumps and

plaintiff's intake is occupied exclusively by the Bingham & Garfield Railway Company for railroad purposes "for the most part upon land whereof *plaintiff* is the owner of the fee, the remainder in part under a decree of condemnation and in part by conveyance from the defendants' predecessor in interest". This is contrary to the evidence in the case. The Bingham & Garfield Railway Company owns the land lying between the fee land of plaintiff and the Valentine Scrip property belonging to defendants. Plaintiff owns no land in Dixon Gulch adjoining the lands of defendants. The intervening land is owned by the Bingham & Garfield Railway Company (Ab. 117), and *plaintiff* has no right on the lands of defendants whatsoever, nor does its property even adjoin that of defendants. At one stage in the proceedings defendants endeavored to have counsel for plaintiff concede that the Bingham & Garfield Railway Company was in some way related to or owned by the plaintiff, but they refused to admit any relationship whatsoever. (Tr. 61)

DOES PLAINTIFF OWN DEFENDANT'S PROPERTY?

Not only in the statement, but through the entire brief we find the following phrases used repeatedly: "To *plaintiff's* intake on Tract C"; "*plaintiff's* intake on Tract C"; "*plaintiff's* intake was constructed upon Tract C", etc. Just where does plaintiff get the impression that it owns any intake upon Tract C? One would think from a reading of the statement and the brief that this intake upon Tract C belongs to plaintiff

and is upon plaintiff's land. This intake upon Tract C is upon the lands and premises of defendant. Plaintiff owns no intake upon Tract C any more than it owns the waters which are seeping and percolating across and arise within Tract D. Plaintiff is in this action seeking the right to acquire Tract C for the purpose of an intake, but it certainly owns none at the present time, and any "intake of plaintiff on Tract C" is only a figment of counsel's imagination.

DOES PLAINTIFF "EXCLUSIVELY OCCUPY" THE BINGHAM & GARFIELD RAILWAY RIGHT OF WAY?

Plaintiff in its brief says on page 3 that the railroad right of way "is occupied exclusively by the Bingham & Garfield Railway Company for its railroad purposes"; and on page 110 plaintiff says: "and the Bingham & Garfield Railway Company is in the exclusive possession of the premises (Tract D) anyway." The word "exclusive" is a very positive and comprehensive word and has considerable dynamite in it. If plaintiff uses this word advisedly, plaintiff must fold its tent, like the Arab, and as silently steal away out of this law suit. If the Railway Company occupies the premises exclusively, the defendant has no right of occupancy therein for any purpose, and the plaintiff can condemn no rights from the defendant in this action. The truth is that the Railway Company occupies the premises for railway purposes only and the defendant retains the right to use the premises in all respects not inconsistent with or interfering with the railway com-

pany's use for railway purposes—including mining rights—including the right to collect copper solutions on and in these premises. If this is not true, why is plaintiff attempting to acquire these mining rights, these rights to collect copper solutions in this action from the defendant? Plaintiff has not cited a single authority in its brief in any way qualifying the authorities cited on pages 55-67 of appellant's brief upholding our contention that the railway's occupation is not exclusive, and that the defendant retains title for all purposes not inconsistent or interfering with the railway's use of the premises for railway purposes, including all mining rights. Certainly the exclusiveness of the railway in its occupancy of Tract D, if not purely fictional, is impartial in its substantialness and would apply equally against the plaintiff collecting copper solutions through condemnation proceedings as against the defendant, the owner of the fee. And if, on second thought, the plaintiff concludes that plaintiff's claim for the "exclusive character" of the railway's occupancy does not make the purpose of plaintiff's action ridiculous, perhaps the defendant could collect water out of the toe of the fill on its own land even though a mining company may not in the interest of its own mining destroy the right of another person to mine in and on its own land.

Certainly if the railway company occupies the railroad right of way "exclusively", the plaintiff could obtain nothing from the defendant in this action.

On page 4 of plaintiff's brief plaintiff proclaims its intention to confine its use of the railroad fill "to the surface in its natural condition". Just what virtue there is in this limitation, if the limitation be true in fact, plaintiff does not enlighten the court; but certainly whatever reality there may be in the limitation, it applies with equal impartiality to the defendant's use of its own property as to the proposed use by plaintiff of defendant's property, and the virtue, if any and if true in fact, will enure to the owner of the land as much as to the attempting condemnor. Our own idea about the matter is that there is nothing to the limitation. If the plaintiff may condemn a right to use the railroad right of way at all, the fact that such use requires some modification of the "surface in its natural condition", if such modification does not interfere with the use by the railroad of the right of way for railroad purposes, would not in itself alone give the railroad or the defendant the right to complain. But will the plaintiff use *the surface* of the right of way *only* in its natural condition?

DOES PLAINTIFF INTEND ONLY TO USE THE "SURFACE" OF THE RAILROAD RIGHT OF WAY IN ITS "NATURAL CONDITION?"

Plaintiff's brief says: "plaintiff, to preserve its property in the solutions and the copper they contain, was compelled to institute this suit to condemn that right", (the right to convey these solutions across this tract through and under the railroad fill) "subject to the railroad company's easements, limiting its use to the surface in its natural condition, without any right to

enter or penetrate beneath the surface or to disturb the condition of the surface." It is then suggested that Exhibit 11 (Tr. 60) gives to the plaintiff the "use and occupation of this surface for that purpose." Plaintiff may not mean that Exhibit 11 purports to limit plaintiff. Certainly Exhibit 11 attempts to authorize plaintiff to do anything plaintiff wants to do on "any part or the whole of said premises * * * and * * * does hereby consent, in so far as any rights or easements owned or possessed by it over, upon, in, beneath, or through the said premises are concerned, that Copper Company may enter upon and do or cause to be done any and all acts and things that will not at any time interfere with the proper use and enjoyment of said premises by railroad company." The statement of plaintiff as to the nature of Exhibit 11 is characteristic of plaintiff's attitude in a number of matters in this action. On the trial the efforts of appellant to compel the plaintiff; in view of plaintiff's assertion that all plaintiff wanted was a ditch to confine itself to a description of land resembling something like what a ditch usually looks like, resulted only in plaintiff saying that what plaintiff wanted was the entire width of the gulch and height of the railroad fill, and that the entire gulch constituted the well-defined course of the water from plaintiff's dump, and that plaintiff must have it all. Now plaintiff says that all it wants is the natural surface of the ground over which the Bingham & Garfield Railway Company has its fill. If plaintiff were to be taken at its own word and the court were to exclude from the plain-

tiff's rights all waters percolating and seeping or flowing through the railroad fill and above "the surface in its natural condition", plaintiff would soon change its tune. What plaintiff wants is the right to collect the copper waters appearing at the toe of Tract D, and plaintiff will theoretically indicate what its "purpose" is and how it will use only the "surface in its natural condition", but would be very much opposed to any limitation in the decree in accordance with its verbal protestations, particularly if the court were to require plaintiff to demonstrate that it would make only such use of its proposed right-of-way. As a matter of fact, the witnesses for plaintiff, all of them, indicated that the only thing that is definite and certain is that the water reaches Tract D and can be caught in the catchment, Tract C.

APPELLANT CONTESTS PLAINTIFF'S RIGHT TO CONDEMN NOT ONLY TRACT D BUT TRACTS A, B, C, AND D.

On page 5 is this: "But Tracts B and C are required for the collection, diversion and conveying away of the copper solutions in Dixon Gulch the *defendants concede to the plaintiff,* so on the proof defendants *do not contest plaintiff's condemnation* of any of Tracts A, B or *C.*" Just where does plaintiff get the impression that there are any solutions in defendants' property in Dixon Gulch which defendants concede to plaintiff, other than those which are brought by the pipe line from Carr Fork and other areas? So also, where is the proof that de-

fendants do not contest plaintiff's condemnation of Tract C? We fear that counsel will have considerable difficulty in pointing to any statement of defendants in the answer or in their briefs where any such concessions are made. On the contrary, defendants have throughout the trial and throughout their briefs maintained and contended for ownership of all waters in Dixon Gulch entering the lands and premises of defendants other than in a pipe line, and certainly have resisted to the utmost of their ability the condemnation of Tract C and the capture of the Dixon Gulch waters upon Tract C, which is nothing more or less than a reduction to possession of defendants' waters upon defendants' own premises. Tract C is the place where all waters are reduced to possession. It is situated upon the land and premises of defendants and belongs to defendants. How can plaintiff say that we do not contest the condemnation of Tract C? This is silly in the extreme.

Appellant disputes the right of the plaintiff to condemn Tracts B, C, and D absolutely and also Tract A as far as the condemnation of this tract in any way interferes with the collection by appellant of the waters in Tract D in the catchment in Tract C. The court will understand the situation. Tract C is a catchment in which is collected all the waters from Tracts A and D, including the drain tunnel, and Tract B is a pipe which carries the waters away from Tract C. There is collected in Tract C through Tract A waters from Cottonwood Gulch. These waters are emptied into the catch-

ment by a pipe following the courses of Tract A. In emptying into the catchment they commingle with waters which the plaintiff brings from outside the land belonging to the appellant, water which is mingled with the water in Tract D, and the workings also interfere with the convenient collection by the appellant of its water from Tract D. For this reason objection is made to the condemnation of Tracts A and B as far as the tracts are used to collect the waters into the catchment at C. If the pipe over Tract B is continued on down the gulch so that it will not empty its water into the catchment at C, there will be no objection, but at the present time there is, and there always has been, objection to this line to the extent that it interferes with appellant's right to collect its own water from Tract D in the catchment, Tract C.

DID DEFENDANT RELINQUISH CLAIM ON COPPER SOLUTIONS FROM DRAIN TUNNEL?

In this connection we desire to refer to the drain tunnel and the pipe leading therefrom. There could be no objection to the condemnation of a right to maintain this pipe from the drain tunnel, except as its waters are now emptied into the catchment in Tract C and interfere with the collection of the waters by the appellant in that tract. We also desire to refer to the statement in plaintiff's brief that the defendants are inconsistent in not opposing the collection by the plaintiff of the water from the drain tunnel. We see no inconsistency. Appellant

has made no objection to the collection of these waters because the drain tunnel leads directly through the railroad fill underneath the plaintiff's dump and conveys the water from beneath the dump through the fill, and this water can at all times be collected and controlled by the plaintiff on its own land. It is because of this fact that appellant has not deemed it worthwhile to contest the drain tunnel waters. While they have not actually been controlled on plaintiff's land by plaintiff, this can so readily be done that no point could be made in compelling plaintiff to do what it actually can do, and in addition, the source of the waters is manifest and while they have up to the present been emptied onto the land belonging to the appellant, it is not necessary that this continue, and without doubt plaintiff will, as it easily can, as soon as plaintiff finds it is required so to do, perfect its title to the waters by controlling and capturing them on its own land. In the meantime, as long as plaintiff dumps them onto the land of the defendant, they belong to defendant.

APPELLANT IS OWNER OF ALL WATERS APPEARING IN TRACT D FROM WHATEVER SOURCE THEY COME.

Again, at the bottom of page 5 and top of page 6, plaintiff would lead the court to believe that the only contention made by defendants was that the waters leaving plaintiff's dump would belong to defendants only in the event they sank into the earth and passed from the property of plaintiff and entered the premises of de-

fendants in the form of a spring from depth. The issues raised by defendants' answer are fully set forth at pages 10, 11 and 12 of appellants' brief. The subterranean course of the waters was alleged because such a source would admittedly, if found, have destroyed plaintiff's alleged title in such waters, but there was no contention in the answer or in the briefs, or at any other time or at all, that defendants had title to these waters *only in the event these waters took a subterranean course.*

As a matter of fact, though of course appellant did not need plaintiff's consent or admission in order to exercise its rights, every defense made by the appellant in this case has been admitted by the plaintiff to be, if it were established, a perfectly good defense. By its answer appellant alleged the waters in question did not come from the dump. This, if established, is a good defense. Plaintiff has admitted such to be the case. Defendant also alleged that if the waters came from the dump they sank into the ground and appeared in Tract D only after distant and circuitous route. This was a good defense. Plaintiff has so admitted it. It ought to be perfectly apparent without plaintiff's admission that it was necessary on plaintiff's theory, without regard to whether that theory was good, bad, or indifferent, that the waters must come from plaintiff's dump. Any proof to the contrary would destroy plaintiff's case at the start. Appellant also pleaded that the title to the waters on Tract D is in the appellant. This was a good defense. Plaintiff has admitted it. On the other hand, the

theory of appellant has never been that if the plaintiff were to establish that the waters came from plaintiff's dump, that plaintiff had established title to the waters on Tract D, or even that plaintiff had established a consummated, final title to the waters while they were in plaintiff's dump. Appellant's position has been, first, the water did not come from the dump; second, if it came from the dump it came by distant and circuitous channel, and title to the water was lost when it left the dump; third, it makes no difference from where or how the water comes, even though it were to come in its entirety from the dump and even though it were to come as a stream in a definite, defined channel, still after it leaves the dump and leaves plaintiff's ground plaintiff loses title, and when the water is collected on defendant's ground it belongs to defendant.

It has always been defendants' position, however, that as to any part of the waters finally collected on defendants' ground, that if such waters came from plaintiff's dump and did not come by distant and circuitous route they reached defendants' Tract D after percolating and seeping through plaintiff's dump and through the gravels and soil beneath the dump and through the fill, the entire fill, at certain seasons of the year, and perhaps through an increasingly smaller area of the fill as the summer season advanced, but still through a large part of the fill and finally issued in the form of a spring at the toe of the railroad fill in the land of the

appellant, and on all fundamental theories of waters rights belong to the appellant. To suggest that the appellant has exclusively held only one of the foregoing contentions or has abandoned any of them is unsupported, a gratuitous assumption.

"DEFENDANTS' REFUSAL" TO "RECOGNIZE" (ACCEPT) PLAINTIFF'S DECLARATION OF PLAINTIFF'S PURPOSE IN THIS ACTION.

On page 8 is this one: "Defendants refused and they apparently still refuse to recognize the fact that plaintiff does not seek by this action *to acquire any copper solutions it does not own.*" In view of the decision of this court in the Montana-Bingham case and of the law set forth in appellants' brief with reference to the ownership of waters which have passed into the lands and premises of others, and with reference to seeping and percolating waters becoming a part of the land in which they seep and percolate, to which respondent does not even attempt an answer, but on the other hand the correctness of which is conceded, it takes a mighty peculiar mentality to be able to figure out that plaintiff is not by these proceedings seeking to acquire waters which it does not own. These waters are not only within the lands and premises of defendants but are captured and reduced to possession upon defendants' premises. Plaintiff's statement in this regard is very much like that of an executioner about to behead an individual, who laughingly stated, "I am not going to kill you; I

am just going to cut your head off." By the same argument any person who once had wild animals, waters, oil, gas, or any of the other roving elements of nature which are peculiarly wild and shifting in contemplation of law, and the legal rules regarding which are discussed in appellant's brief, and the ownership of which is lost without the will of the person from whose lands or premises they escape, might very well say, "We will reclaim that which is lost. We know we have lost title to this wild and roving thing and that the right to possession and ownership has passed from us into the hands of another, but we will condemn our neighbor's land and then we will not only thereby regain ownership of that which we have lost, but will in addition take all other wild animals, gas, oil, water, etc., upon his premises and not pay him a cent for it, because, perchance, it was once ours." This is exactly the situation in this case, and in this connection it is interesting to note the evidence of Mr. J. D. Schilling, Mining Superintendent of the Utah Copper Company. He testified (Tr. 278) as follows:

> "Q. And it is your theory, as I understand, that these waters escape from the dump up above?
>
> A. Yes, sir.
>
> Q. And you intend to capture them down below some hundreds of feet on the Valentine Scrip?
>
> A. Yes, sir."

DEFENDANTS CONCEDE NOTHING TO PLAINTIFF IN THIS ACTION.

Here is another one on page 8: "Were it to have been found that defendants instead of plaintiff owned the copper solutions plaintiff sought to convey over the easements across A, B, C, and D condemned in this action, then this suit would have been dismissed, *but defendants' concessions on the proof deprived them of that defense.*" We do not know whom plaintiff is seeking to fool by this statement nor to what concessions on the proof plaintiff refers. Since plaintiff does not particularly state what concessions on the proof are referred to, and since defendants have always contended that defendants owned these waters regardless of their source or course after they entered defendants' premises, and is now appealing from the decision of Judge McDonough for failure, among other things, to give defendants that which is theirs as a matter of law, we can only conclude that plaintiff makes that statement in the hope that such strong talk will fool someone. This is sheer unsupported bombast and means nothing.

DID DEFENDANT STIPULATE TO SETTLE FOR $500.00 APPELLANT'S CLAIM FOR $200,000.00 AND UPWARDS?

On page 9 plaintiff says this: "Not one page of that record is directed to the issue of damages, the ultimate issue in a condemnation suit." After the lower court had deprived defendants of the right to present evidence as to the value of the waters within the prem-

ises sought to be taken, what was the use of presenting evidence upon other matters? Also, where does plaintiff get the impression that the ultimate issue in a condemnation suit is damages? The statute prescribes at least three issues to be presented and determined before you even arrive at the question of damages, any one of which preliminary questions may be ultimate. Counsel would have us believe that a corporation like the Utah Copper Company should have the court take judicial knowledge of the fact that it is entitled to take the lands and premises of its neighbors with impunity, and thereby, *without compensation,* acquire the waters thereon, and simply waive aside the three preliminary issues prescribed by the statute, and proceed immediately to the taking of evidence as to the amount of damages, eliminating, of course, for the benefit of the Utah Copper Company, all evidence of the value of the waters within the lands taken.

"TITLE", OR, AS WE THINK, MORE ACCURATELY, "USE" UNDER SEC. 7333, COMPILED LAWS OF UTAH, 1917, IS THE MOST IMPORTANT QUESTION IN THIS CASE.

Counsel states this on page 9: "This prolonged controversy revolves about only one issue, i. e., *in whom is the title to the copper solutions?*" In view of the total lack of answer on the part of appellant to the law as set forth in appellant's brief with reference to the ownership of waters with relation to ownership of the land we should think counsel would have been afraid to have had

this the only issue. Certainly *plaintiff* was not contending for any such proposition, and a reading of defendants' answer and of the evidence taken in the case as abstracted by appellants shows that evidence was produced with reference to each and all of the issues presented by the answer.

HOW MUCH IS THE LEGAL ADVICE OF THE ATTORNEYS FOR THE PLAINTIFF TO THE DEFENDANT AS TO THE BEST WAY TO PROTECT DEFENDANTS' RIGHTS, WORTH?

On page 9 is this: "Defendants could with greater propriety have sought the relief they desired by suit to enjoin diversion of copper solutions of which defendants claim to be the owners." This is the first time plaintiff has presented this idea. In other words, they say that while defendants own the waters after they enter the lands and premises of defendants, the only remedy of defendants is to stop the Utah Copper Company, by an injunction suit, from taking them. In other words, we must sit idly by and consent to a condemnation case, and then, after that is over, go into an equity case in the hope that the equity court will reverse that which the court hearing the condemnation case might do. It would seem that defendants should have entrusted their rights to the counsel and advice of plaintiff's attorneys, which would have been, as we read their brief, to make no defense to the condemnation case excepting as to the element of damages, eliminating, of course, all evidence as to the value of the waters on the premises,

take $500.00 as the value of the land without the water, and then thereafter file an injunction case in a court of equity. We fear this advice is given over the left shoulder. Plaintiff is not in a position to complain about the forum or the character of the case in which the issues in this case are tried. It chose the forum and prescribed the character of the case, and so far defendants have been content to rely upon the counsel and advice of their own attorneys as to defenses thereto and procedure to be taken.

There is controversy in this case as to whether or not on plaintiff's own showing there is legal necessity for the plaintiff, if it has the legal right otherwise to condemn Tracts C and D, because plaintiff owns the property higher up the gulch and therefore has an opportunity on its own land at comparatively little expense to collect the waters which come from its dump. On the other hand, plaintiff denies that there is any certain opportunity to collect the waters at any point in the gulch above Tract C. It is therefore manifest that plaintiff's position is that Tract C is the strategic point and the only point at which appellant could collect the copper waters in Dixon Gulch. How manifestly insincere, therefore, is the repeated suggestion made in respondent's brief that the appropriate and consistent action for appellant in the defense of the condemnation suit would have been to concede the right in plaintiff to condemn Tracts C and D and then in another action to have raised the question of whether or not plaintiff was taking de-

fendant's water in Tract C. This would not have been closing the door to the barn after the horse was gone; it would have meant, according to plaintiff's position regarding the exclusive character of Tract D for capturing waters in Dixon Gulch, demanding possession of an animal ferae naturae after permitting the enemy to acquire the only barn in which the wild animal could have been captured or controlled by defendants. We may have an exalted opinion of our own wisdom and learning, but it does not extend to a belief that we know enough to conduct both sides of a law suit with equal success, and we are not prepared to concede even to counsel for plaintiff that he is as wise as he thinks he is.

DRIED UP WATERS.

On page 11 plaintiff discusses various little pools of copper water that had spilled over from the drain tunnel, and then said that "plaintiff piped that part of the copper solutions from the drain tunnel to *its intake on Tract C*, whereby to dry up the little pools of copper water that had been created by the spilling of the solutions from the easterly portal of the drain tunnel." Plaintiff gives no reference to any evidence of such drying up, and there is no such evidence in the case. This statement is wholly unsupported by the record and we ask plaintiff to produce any evidence sustaining such statement. The water occurrences in lower Dixon Gulch are described in the brief of appellants, and these water occurrences were still there at the termination of the trial

and are still there at the present time. There was some dispute as to the source of the copper solutions in these various places described, but no one ever testified that they dried up when plaintiff piped the waters from the drain tunnel to the catchment on Tract C. They persisted in spite of such piping. In this connection we call attention to another statement of plaintiff at the bottom of the paragraph on page 11, wherein counsel says: "When therefore, mention is made of Dixon Gulch water, title to which is claimed by defendants, it is only the so-called 'Hays Spring' copper solutions that are referred to." Search appellant's brief and see whether this is true. Also seek through the brief and find some place where we waived any title to the drain tunnel water. These various water occurrences have never been segregated in considering this case, waiving as to one and claiming as to the other. Defendants have presented their case with reference to all water occurrences upon their lands and premises. Drain tunnel waters, of course, flow through a well defined channel in a tunnel, and the portal to the tunnel is just on the edge of the Valentine Scrip, so that it would be an easy matter for plaintiff to step inside of the tunnel and capture these waters upon the premises of the B. & G. Railway. There is no dispute as to the source of those waters. Right of ownership to the water occurrences upon defendants' property has never, orally or in writing, been waived by defendants.

DID PLAINTIFF "ACQUIRE BY ARRANGEMENT" WITH BOURGARD AND ODDIE "WHAT LITTLE WATER THERE WAS IN DIXON GULCH BEFORE THE MAKING OF PLAINTIFF'S DUMPS"?

Another one: At the bottom of page 11 and the top of page 12 counsel says this: "What little water there was in Dixon Gulch before the making of plaintiff's dump there, plaintiff acquired by arrangement with Jerome Bourgard and J. W. Oddie, the original appropriators." In the first place the record is replete with evidence that this was not a *little water*, but, on the other hand, was considerable; that the waters came from two or three springs several hundred feet west from the B. & G. fill, at which was known as the Picnic Flats. The water was used by Bourgard and Oddie and the Bingham Hotel. Plaintiff did not own this water nor did plaintiff base any claim upon such alleged ownership, as shown by one look at the complaint, nor did plaintiff at any time, or at all, acquire any ownership, from Bourgard and Oddie. The evidence with reference to this alleged transaction was given by Mr. Goodrich at page 137 of the abstract, and again at transcript 427. Mr. Goodrich testified that the negotiations were never completed; that Bourgard was the only one of the owners who ever signed Exhibit 29; that there were others interested. The instrument upon which plaintiff now seeks to say that it was the owner of Dixon Gulch waters before the fill was put in is as follows:

"EXHIBIT 29.

No. 286403

This Agreement made and entered into this 16th day of October, 1911, by and between Jerome Bourgard, of the town of Bingham, Salt Lake County, Utah, party of the first part and Bingham & Garfield Railway Company, a corporation organized under the laws of Utah, party of the second part, witnesseth:

That, Whereas, the party of the first part is the owner and entitled to the use of an undivided one-half interest in a certain stream of water having its source in Dixon Gulch, Bingham Canyon, Utah, and

Whereas, the party of the second part is desirous of obtaining the right and privilege of using any surplus water in said stream for culinary purposes only it is agreed by the parties hereto that for the sum of One Dollar, paid by the party of the second part to the party of the first part, receipt whereof is hereby acknowledged, the party of the second part shall have the right to impound the waters of said stream and convey the same by means of suitable pipes or conduits, to a tank constructed by the said party of the second part on its own premises, said tank to be connected by means of pipes of proper size with the pipes or conduits now in use by the party of the first part, at such point on the main line as said party of the first part shall designate and in such a way that the rights of the said party of the first part to said waters as now enjoyed by him shall not be interfered with or abridged by the party of the second part.

Witness our hands *and seals* the day and date above written.

Jerome Bourgard

Bingham & Garfield Railway Company,
Signed By John M. Hays, Secretary.

Witnesses:
Chas. T. S. Parsons
J. S. Gard.
Oct. 16th, 1911."

This is a splendid example of the hardihood of plaintiff in confidently stating facts which never existed.

Again at page 13 plaintiff states that the easterly boundary line of plaintiff's property is the westerly boundary line of defendants' property. We have heretofore discussed this point. The Bingham & Garfield Railway Company right-of-way lies between the two.

So much for plaintiff's alleged statement of facts.

Plaintiff's Argument A seems to be an attempted answer to defendants' law points 1 and 2. Plaintiff's counsel in this case reminds us somewhat of a young man who was attempting to pass a bar examination. He was asked for the doctrine of "ancient lights". Never having heard of the subject matter and being unable to make any answer thereto, he said as follows: "I have never heard of the doctrine of 'ancient lights', but to show you that I know something about law I will give you the rule in Shelley's case."

APPELLANT HAS ABANDONED NONE OF APPELLANT'S DEFENSES.

Finding the law all against them upon the proposition of the ownership of these waters, regardless of their source, when they enter the lands and premises of de-

fendants, they attempt to set up a few straw men, and then by giving a detailed abstract of the evidence presented by plaintiff upon the probable source and course of the waters occurring within the defendants' premises hope thereby to divert the attention of the court from the law presented in the law points. This has to do with a statement made by counsel which has heretofore been referred to, namely, that if the solutions had sunk into the earth and had passed from plaintiff's property and been comingled with the waters within adjacent property and the subterranean waters of the earth and had become lost, that then they would cease to be the property of plaintiff and become the property of defendants. Plaintiff feels that if they can set that up as the only defense of defendants and thereby induce defendants to concede such to be the only defense which defendants might interpose in this case, that they could thereby shift the issue and bring defendants out of the trenches to defend this straw man. We again call the court's attention to the fact that this was only one of the many defenses relied upon and was not at all determinative of the case.

WHAT IS A SPRING?

Plaintiff in this case is violently antagonistic to the use of the expression "spring" in reference to the occurrence of the waters on Tract D. Its objection to the word has never been clearly defined. Plaintiff apparently has a vague but unascertained apprehension that a "spring" would hurt plaintiff more than something else

and therefore secured the trial court's determination that the water occurrence in dispute is not a spring, though just what it is if not a spring, the plaintiff has not disclosed.

> "The word 'spring' when applied to water, means the formation of water that naturally gushes out of the earth's surface. A spring is a place where water issues from the ground by natural forces. Furner v. Seabury, 13 N. Y. Supp. 12, 16, 59 Hun. 272 (citing Magoon v. Harris, 46 Vt. 264; Bloodgood v. Ayers, 108 N. Y. 405, 15 N. E. 433, 2 Am. St. Rep. 443).
>
> " 'Springs', as used in a deed granting the privilege of taking water from springs, means a place where water by natural forces usually issues from the ground, and does not include places where the grantor reached water by orifices in the ground, and where the water did not flow to the surface. Magoon v. Harris, 46 Vt. 264, 271.
>
> "A spring is water issuing by natural forces out of the earth at a particular place.
> —Words & Phrases, Vol. 7, p. 6617.
>
> "Water rising to the surface of the earth from below, and either flowing away in the form of a small stream or standing as a pool or a small lake, is the definition of a 'spring'. De Wolfskill v. Smith, 89 Pac. 1001, 1003, 5 Cal. App. 175 (quoting Cent. Dict.)
> —Words & Phrases (2d Series), Vol. 4, p. 663.
>
> "Evidence held sufficient to sustain finding that waters collected by sunken box 40 feet from box first established, had the same source, and were part of one spring and conveyed by deed of spring; a 'spring' being a marshy area of small but definite extent, wherein underground waters

find their way to the surface. Harrison v. Chaboya, 245 P. 1087, 1088, 198 Cal. 473.
—Words & Phrases (3d Series), Vol. 7, p. 117."

There are numerous definitions in Baldwin's Century Edition of Bouvier's Law Dictionary, commencing on page 1125, of similar character to the foregoing; and Webster's New International Dictionary gives the following definition: "Any source of supply, esp. that of a stream; an issue of water from the earth; a natural fountain."

In the present case plaintiff's own contention is that waters falling on its dump, percolate and seep through the dump, finally finding their way to the bottom of Dixon Gulch where after, flowing for a short distance, they appear at a collecting point through the toe of a railroad fill. This statement, without admitting the conclusions of the description as a matter of fact, we respectfully suggest, is a perfectly permissible description of a spring. The waters of a spring always have their origin at a higher level than the spring. Such waters flow from various sources and finally reach the surface. It does not destroy the character of the spring to say that the water must have its origin in a considerable area, and does not destroy the character of the spring to say that prior to the water issuing to the surface it flows in a collected volume. All water has been surface water at some time. Even on plaintiff's theory the water occurrence on Tract D is a spring. The theory of appellant would give a wider source to the water and

would account for the existence of the water occurrence in the toe of the fill prior to the placing of the dump in Dixon Gulch, commencing in 1926. In our opinion, and the evidence certainly bears us out, otherwise it is impossible to account for the water prior to the dump, the water issuing from the Hays Spring at least comes from the entire drainage area of Dixon Gulch, and in all likelihood this area will include higher and adjacent lands. Plaintiff attempts to make considerable out of the fact that the court found against the appellant on appellant's geological theory and also on appellant's theory that even though the water occurrence on Tract D is not a synclinal manifestation from distant sources, it still includes water from sources other than plaintiff's dump. Plaintiff attempts to twit appellant because the court below did not agree with appellant and to cover the appellant with humiliation because of appellant's disaster on the trial. It has always semed to appellant that on an appeal it was much safer to cheerfully, carefully, and perhaps prayerfully, disclose to the appellate court the grounds on which the decision below rests than to chuckle in glee and stick out one's tongue at the mere fact of a preliminary victory.

It took his Honor who tried this case below more than two years to reach a decision favorable to the plaintiff's contention. It cannot be that the basis of plaintiff's claim is as simple and apparent as plaintiff seems to suggest; and the difficulties of arriving at a conclusion favorable to the plaintiff are, we think, indicated

by the fact that plaintiff has carefully refrained from any detailed disclosure of the basis of plaintiff's rights and from an attempt to support such rights by an appeal to the authorities.

The Hays Spring waters issue from the ground and appear through a rock wall. What difference does it make whether you call it a spring? There can be no doubt of the fact that this water occurrence comes nearer to being a spring than anything else. It certainly is not a river, nor is it a creek, nor is it a well. Plaintiff says that no witness, with the possible exception of the defendant Stephen Hays, was produced who testified that he ever saw a spring in the bottom of Dixon Gulch either before or after the construction of the railroad fill.

OLD MINERS VS. MAY-WALKERS—WERE THERE WATERS IN DIXON GULCH BEFORE THE RAILROAD FILL?

Richard D. Connary, an old miner, testified that he prospected and mined the sulphide vein in Dixon Gulch at a point now beneath the B. & G. fill. He stated (Ab. 248) that he sank a hole about five feet deep, close to the bottom of the canyon, about twenty-five or thirty feet to the north of the bottom of the gulch on the sulphide vein, and that he prospected along that vein several years afterward for different parties, and there were quite a number of old prospect holes beneath the fill on the north side along the vein, and that there was water in that hole (Ab. 249); that water appeared all along the sul-

phide vein wherever there were any holes dug; that he didn't recall how much water there was, but there was so much that "I couldn't do much work there" (Ab. 250); that it was so long ago that he did not remember the quantity, but "I remember there was quite a lot of water running out of there and these other holes along up the vein." He stated further (Ab. 251) that some of the water sank in the soil and then seemed to appear again on the solid bedrock; that in some years it could be observed by people passing up and down the canyon, and in some years it could not; that there were big boulders in the bottom of the gulch and there was considerable gravel collected there and might not be seen.

Ammon B. Stringham mined in Dixon Gulch at the U. & I. Tunnel; that he never went up in the bottom of the gulch but saw men working in Dixon Gulch *below where the B. & G. fill now is*, on the tunnel and inclines on the side of the hills; that he always saw water there coming out of these holes and running down the side of the hill (Ab. 262-264); that these holes were along the sulphide ledge on the right-hand side of the gulch going up, about seventy-five or one hundred feet up from the bottom of the gulch.

Thomas Stringham, brother of the former witness, testified that he prospected Dixon Gulch where the B. & G. fill is, and that there was water in that portion of the gulch below the Gardelli workings. There were two or three places where the water came out there, and that the tunnels were on the right side, and that in addition

there was a spring about one hundred feet along the bottom of the gulch which broke out on the side hill; that the place where the bad water came out was a little west below the B. & G. fll and is underneath the fill at the present time.

The evidence of these men, in the face of the evidence given by Messrs. Earl, Goodrich, Bowman, Inglesby, Heaston, Straup and Kelly, all of whom testified that lower Dixon Gulch was a veritable Sahara, was subsequently demonstrated to be correct and accurate by the discovery of the two incline shafts at a point on the sulphide vein beyond the B. & G. fill, but within Tract D. These discoveries simply showed that the witnesses for plaintiff, testifying according to their best knowledge, no doubt, so far as their observations had disclosed, showed that these water occurrences beneath the B. & G. fill were discernable only to the prospector and miner who worked along the sulphide ledge, because there was a thick growth of underbrush up to the sulphide ledge, and because all of the water would sink into the soil and gravel in the gulch and seek the real bottom of the gulch (Ab. 213-220-221-239-251-252). The evidence in this case is undisputed that Dixon Gulch was not a place for much walking. The bottom of the gulch was full of large rocks and boulders, very precipitous, and at some times of the year would be swept clear of gravel, and at other times there would be a lot of gravel on the bottom of the gulch. (Ab. 251) This variation was not only true as to

seasons of the year, but was also true of the various places within the gulch.

Weeks were not consumed for the purpose of proving that these waters within Tract D were or were not a spring. Weeks were consumed in producing evidence with reference to all of the defenses presented by defendants both on behalf of plaintiff and defendants. Plaintiff states on page 16 that the whole purpose of defendants' case was consumed to prove that there was a spring. How silly! Defendants presented evidence with reference to all of their defenses.

Counsel states that this geological fantasy of the Hays Spring was a creature of defendants' ingenuity. This issuance of water from the ground through this rock wall upon defendants' premises certainly was no creature of anyone's ingenuity. It was a reality and of sufficient reality to become the apple of plaintiff's eye, so much so that it was willing to endeavor to obtain it for itself by devious and questionable attempts at bargaining in the beginning (Ab. 207), and then, their purpose having been ascertained, through these proceedings. They did not want to take the chance of losing this *creature of ingenuity* by tunnelling in to the toe of their dump, as was done in the Tiewaukee case, to collect for themselves only such water as they owned, because they knew very well that this *creature of ingenuity* constituted waters comingling from various sources, and was in existence as a reality long before their dump was placed in Dixon Gulch, which gave positive evidence that

this water occurrence *could not be an outlet from their so-called reduction works* (plaintiff's dumps).

Would plaintiff have us believe that the waters which were appearing at the Hays Spring before plaintiff's dumps were established in Dixon Gulch were the waters from the Bourgard and Oddie spring at Picnic Flats? They never made any such claim when the case was tried in the lower court, because such a theory is destructive of their entire theory with reference to these waters being an outlet from a so-called reduction works. They had to have these waters come from their *dump,* and all of their experts testified that they left the dump at the toe of the B. & G. fill. They wanted to be so certain of this point that they had the trial court find that all of these waters come from this so-called reduction works, and had the court hermetically seal the surface soils underneath the dumps in Dixon Gulch, together with all of the cracks and fissures in the rocks beneath the same, and to render that soil substantially impermeable to the waters *flowing down through the dumps,* and that "all such waters are confined to the top of the surface soil underneath the dumps". We are wondering how these Bourgard and Oddie spring waters got up into the dumps so that they could flow along the top of the surface soils and get out of this shaleylike substance. Of course plaintiff had to hermetically seal the dump or it would not have been a reservoir. (Speaking of creatures of imagination or ingenuity, we want the court to remember that plaintiff has had to have a very

vivid imagination to have this great big dump a reservoir or sponge; this entire gulch, including the bottom and both sides, filled up with the railroad fill, be a ditch or canal; and this dump a reduction works within the contemplation of our law relating to eminent domain. So much for digression.)

The witness Earl testified (Ab. 110) that there was a spring about forty-five feet above the railroad fill and one about 800 or 900 or 1000 feet farther up, and further testified (Ab. 112) that the waters which Oddie and Bourgard were using in 1912 were arising on the Valentine Scrip patent:

> "Q. That water that you have described which Oddie and Bourgard was using was arising on the Valentine Scrip patent?
>
> A. It was being collected on the Valentine Scrip patent. *Where it was arising I couldn't say* because it was coming out right under the toe of the Bingham and Garfield Railroad fill.
>
> Q. Coming out on the left?
>
> A. It dipped to the left.
>
> Q. Is that the same place where it is coming out now?
>
> A. I couldn't say, it is all covered with fill now and nobody can see it. If I might indicate on this exhibit I will show you about—
>
> Q. Yes, I will ask you to do it?
>
> A. It is somewhere in this vicinity right here is where the water was coming out where I have marked with a cross up there, that is after the original construction of the Bingham & Gar-

> field Railroad and the fill had been placed in there."

He testified further that after the waters from the Picnic Flats Springs ceased to be diverted by the Bingham & Garfield Railway Company in 1915, that such waters (Ab. 126) were not flowing through the drain tunnel; that he did not know what became of it; "that all I know is that it was not being taken away from there and was not appearing below on the surface in the low season of the year. It just was not appearing on the surface. I am speaking only of the dry season. I did not see it during the wet season either. I just observed the water running in the reservoir above the B. & G. fill *and do not know what became of it.*"

These Bourgard and Oddie Spring waters were also described by A. L. Heaston, one of the plaintiff's witnesses, who testified (Ab. 189) that after these waters left the springs they flowed for a short distance on the surface at certain times of the year. His evidence is as follows:

> "Q. Would you say then that other than in the spring of the year water from those springs flowed only a short distance?
>
> A. It flowed a short distance, yes sir, and when it got to where there was gravel and loose stuff, it would sink.
>
> Q. Disappear?
>
> A. Disappear, yes sir."

Mr. Earl further testified (Ab. 467) that these spring waters, after they left the reservoir about a thousand

feet west of the B. & G. fill seeped through or under the fill and went down below; that in his opinion it seeped down through the fill, either through the fill or underneath the fill. "It may never have appeared on the surface below, but it certainly came down below."

If this evidence is correct—and plaintiff is in a poor position to dispute it because it was produced by its own witnesses—then there can be no doubt of the fact that the reappearance of these waters out of the gravel on defendants' premises constituted a spring from subterranean seepings and percolations, and these waters are not from the dump of plaintiff and never were in this so-called reduction works. If these waters sank to depth and found a course along bedrock, then it would seem that there was rather a substantial hole in this sealing process—in this so-called reservoir described by Mr. Beeson as being a "reservoir within a reservoir", and we certainly see no reason for not giving the waters which were appearing at the Hays Spring before plaintiff's dumps were in Dixon Gulch a subterranean course, either beneath the fill or into the synclinal basin and out over the sulphide ledge, as described by Dr. Pack and Mr. Crane, and as demonstrated beyond all question by the waters in the north and south incline shafts.

THE GEOLOGISTS.

None of plaintiff's geologists and experts stated, however, that the waters appearing at the Hays Spring were the Bourgard and Oddie waters. They all testi-

fied that the Hays Spring waters were from the dump; that they trickled along the top of the surface soils beneath the dump and then seeped and percolated through the fill along a wide expanse of wash material, which was described by plaintiff as "semi-pervious", but which was described by witnesses for defendants as being impervious to the downward passage of the water —such as to stop the water at that point from sinking into the so-called French drain in the bottom of the gulch. At first, plaintiff's witnesses testified that these waters passed through the French drain, but a reading of the evidence of Mr. Beeson showed that that was completely abandoned, and on one occasion counsel for plaintiff described any such theory as "sheer nonsense" (Ab. 373-374).

How can plaintiff and defendant escape the only logical conclusion to which a reasonably minded person must come after reading the evidence of lay witnesses on both sides, and of experts bought and paid for and produced by both sides, to-wit, that the waters appearing on Tract D (the Hays Spring and all of the rest of them) are from various different sources, to-wit, from the sulphide vein from the Picnic Flat Springs, reappearing after their subterranean course (and in this connection the court will bear in mind that Mr. Earl testified that in his opinion the gravels (Tr. 2275) are very deep at the toe of plaintiff's dumps against the B. & G. fill, and that it would be necessary to go considerable depth to shut off the waters); also that a portion

of these waters come from precipitation upon the B. & G. fill, which is a substantial area and composed largely of similar material to that within the dumps, and which fill has been by the trial court decreed to be a part of the premises of defendants, and with reference to which finding no cross appeal is taken, nor is there any attempted answer on the part of plaintiff as to the argument made in law point 2 as to our ownership thereof so far as these waters are concerned.

Plaintiff's brief, under subheading A of argument II, commencing at page 14 of the brief and ending at page 64, is nothing more nor less than a one-sided abstract of plaintiff's own evidence. We assume counsel feels that this court intends to read the briefs only and pay no attention whatsoever to the abstract of *all* of the evidence produced in this case by both parties.

In view of this situation it is a great temptation to defendants to meet this sort of tactics by likewise quoting from the evidence, and doing so with great partiality to *defendants'* side of the case.

Defendants have no controversy with the evidence of Dr. Inglesby, Dr. Straup, Mr. Heaston, Mr. Hocking or Charles Kelly. They were casual visitors in Dixon Gulch, but it was no place for pleasure seekers because the bottom of the gulch was precipitous in places and was full of big boulders. The path to Picnic Flats was along the top of the ridge to the left (Ab. 257). Dr. Straup, however, used to go into the gulch during the month of May to court his sweetheart—the present Mrs.

Dr. Straup—and he frankly admitted that when he was in the gulch he was looking for soft places on which to sit and was not looking for water seeping over sulphide ledges. The same with Dr. Inglesby. He was just a May-walker in the gulch. All of these witnesses testified absolutely that there were no water occurrences on this tract in question, and yet within a day or two after they gave their evidence we found water coming over the sulphide ledge at the two incline shafts. They simply were not looking for water occurrences when they were in there, and had no such opportunity for information as the old miners who were presented by the defendants, and whose evidence has heretofore been quoted.

Defendants produced Dr. Frederick J. Pack, of the University of Utah, Guy W. Crane, geologist for the Chief Consolidated Mining Company of Eureka, Leland H. Kimball, hydraulic engineer, and Ronald M. Crocker, eminent mining engineer, all of whom testified for defendants. Their evidence is abstracted and set forth as given in the abstract which has been presented in this case. They completely destroyed and filled up the so-called French drain which plaintiff at first relied upon for the passage of these waters through the railroad fill, and they did it so effectually and so completely that counsel for plaintiff finally, in open court, announced the abandonment of such an idea (Ab. 373-374), and it was never heard of again. From there on they took the view, as expressed by Mr. Beeson and Mr. Earl, that these copper solutions as they arrive at the point of

contact with the B. & G. fill, seep and percolate laterally out through the fill.

"Q. What have you assumed to be the condition of the first flume from your lower wing of the upper portal of the drain tunnel, what have you assumed to be the condition of that terrain?

A. I have assumed that to be—I hadn't really given it very much thought because my conception of the way those solutions, these copper waters passed through there is that they encounter instead of an impervious seal it is just semi-pervious, that is it simply prevents the flow from being rapid, and that the copper waters will eventually percolate through it.

Q. That is your seal against the toe of the fill?

A. Yes sir.

Q. You think that is semi-pervious?

A. Yes, I think it is.

Q. That the waters percolate downward through that and into the fill and percolate out through the fill until they reach the bottom of the gulch and appear down at the Hays spring, is that your idea?

A. That is right.

Q. Does that extend across the entire upward toe of the fill?

A. I should think so.

Q. So that when you said it flowed down through the fill, you didn't know of any particular channel in which they were coursing down through the fill, did you? You have seen no evidence of that, have you?

A. No, not of any particular channel except when it comes out, when I have observed it, it all came out at one place.

Q. I think you stated those waters are seeping and percolating in the fill, in the soil above the fill and above bed-rock, is that correct?

A. Yes, that is right.

Q. You observed the water percolation between bed-rock and the collar of the raise in the catchment tunnel, did you not, Mr. Beason?

A. Yes, I think I observed that."

* * * * * * * *

"Q. Is that the character, the same general character of water seepage and percolation you have described in your evidence—is the way the water leaves the fill and comes down to the point where it accumulates for the making of the Hays spring similar to that appearance that is in the shaft there or in the raise?

A. Yes, I think it is. I believe there are places in the bottom of the stream where the gravel would have a certain amount of mud in it and force more water to come out right in the bed of the stream than others." (Ab. 501-503)

Defendants' geologists and engineers testified that this synclinal basin was composed of massive quartzite as a base, on the top of which the sulphide ledge, and that within the basin is a great mass of shattered quartzite, incompetent to hold water, capped by a thin layer of surface soil and rock debris. They testified that in their opinion it was a physical impossibility to place upon this ground a large reservoir or sponge, dripping

wet and full of water, without having that water pass out in every direction, except up, into the surrounding areas; that on account of the broken, fractured, and incompetent character of the quartzite lying above the sulphide ledge, that these waters would naturally find their way out into the surrounding country, then downward to the sulphide ledge, and then pass over the lip of the synclinal basin wherever it could, and thus add to the waters which had theretofore been appearing at the Hays Spring. This basin is not a hollow one, but is full of shattered and fractured materials, and the waters within the basin are seeping and percolating in various directions, always seeking the lower levels. They do not comingle and become an admixture in the sense that waters do when placed within a hollow basin, but they have their areas and particular localities within the basin. The north and south inclines are admittedly not at the axis of the syncline, and yet we find water coming out in these localities varying in quality within a distance of twenty feet of each other, and other waters were found along the sulphide ledge during the course of trial farther north and farther up on the limb of the syncline. These experts testified that it was only natural that these waters from this so-called reservoir or sponge, lying immediately above the sulphide ledge in Dixon Gulch, should find their way out on the sulphide ledge at a point beneath the B. & G. fill—the lowest point on the sulphide ledge in Dixon Gulch—regardless of whether it is the axis of the syncline, as testified by defendants' experts, or slightly to the right of the axis,

as testified by plaintiff's experts, and then appear on the surface at the Hays Spring and at the other points as testified.

In this connection plaintiff was none too proud of the evidence of one of its so-called experts—Mr. Frederick D. Hanson. The court will notice that while plaintiff quotes extensively from the evidence of Mr. Beeson, it gave but a short paragraph to Mr. Hanson. This expert is the one who sealed the surface soils beneath plaintiff's dumps and compressed them into a shale-like substance. In fact, he was so sure it was shale that he went out to a point in the Niagara drain tunnel beneath the Utah Copper Company dump in Dixon Gulch. He stole into this tunnel and made extensive and profound observations and viewed the premises with great skill and learning. He found the soil hard and firm, not easy to pick into and pick out a piece. There was also indication of cleavage and parting parallel to the surface of the soil, and in general the soil had a compressed, compact appearance, somewhat resembling the formation in a bedding of shale (Ab. 509-510). Upon cross-examination defendants had him definitely locate the spot where he had made these profound and learned observations so that there might be no mistake with reference to the exact spot. Thereafter Mr. Crocker and a mining engineer named Shelton went to the place, took a sample of the material, and brought it in to court. It was introduced in evidence, and lo and behold it turned out to be plain, everyday manure (Ab. 567) and should

have been handled with a pitch-fork. Mr. Shelton called it leaf mold. He and counsel for plaintiff had quite a dispute (Ab. 567-568) as to whether it was manure or leaf mold. This is the shale-like substance which Mr. Hanson found, and upon this evidence counsel for the plaintiff had the court make finding of fact No. XXXIII to the effect that the weight of the dump compresses the surface soil and gives it a compact appearance.

Just at this point it may not be amiss also—since plaintiff complains bitterly about the amount of time taken by defendants in presenting their case, and also takes considerable delight in calling attention of the court to the fact that on one or two minor details there was some slight variance between the evidence of Dr. Pack and Mr. Crane—to call attention of the court to the fact that Mr. Earl, who disclaimed being a mining engineer or having any knowledge whatsoever of water or water courses, etc., (Ab. 106, Tr. 103-104) and yet presumed to criticise the opinion of his chief, Mr. Goodrich, and of Mr. Crocker with reference to the possibility of collecting these solutions at the toe of plaintiff's dump, but who nevertheless was a handy witness and served the functions of utility man on the Utah Copper Company team of witnesses, and who evidently on some occasions might be able to make a survey with a transit, consumed several days of the court's time trying to prove a survey of the area now covered by the dumps in Dixon Gulch which was made in 1924. After Mr. Earl had testified at great length and at great expense to both

parties, and had taken personal credit and responsibility for the survey (Tr. 2220), and one witness had been brought from Los Angeles to identify notes, etc., and others had been produced to show how carefully these notes were safeguarded, indexed and filed, it was found that this great surveyor, this man who disputed with Mr. H. C. Goodrich, chief engineer of the Utah Copper Company—the head of his department—on such an important proposition as the possibility of capturing the Utah Copper Company solutions at the toe of their dump, in order to make one observation called for in that survey would have been required to see through a hill, and that in order to see the top of the rod, being held as high as the tallest rodman could hold, and with the transit at the very highest point, he would have been compelled to see seven feet underground (Tr. 2485), and the whole thing was thrown out as inaccurate and worthless (Tr. 2480-2481-3141). Several days were lost, and this great engineer, Mr. Earl, took his place on the bench along side of Mr. Hanson, the great geologist, who discovered the shale-like substance hereinbefore referred to. This evidence of Mr. Earl's was so utterly worthless and valueless, and so unreliable that it was eliminated from the abstract by mutual understanding.

So much for the experts produced by plaintiff.

We are not going to weary this court with a further detail of the evidence presented to the trial court by defendants and its witnesses, upon the proposition of geology and water courses. We are going to assume

that this court will be able to read that evidence and appreciate and understand it. Suffice it to say that there was a substantial conflict. It was no such one-sided proposition as that attempted to be stated by plaintiff in its brief. In fact, it was so substantial that Judge McDonough took about two and one-half years to decide the case, and then when referring to the court's decision upon this matter the court said as follows: "This phase of the law suit is the one that has caused the court the greatest difficulty insofar as the labor of reaching a conclusion thereon is concerned, as it necessitated, after the filing of counsel's brief, a re-examination of a great portion of the evidence with reference thereto and to the notes of the court with reference to actual observations."

WHO PUT THE COPPER IN THE WATER?

Under point III, commencing at page 59 of the brief, plaintiff attempts to explain how the Hays Spring waters came to have a copper content years before the Utah Copper Company dumps in Dixon Gulch were placed there. He states that we relied very largely upon the evidence of George B. Robbe, a witness called for plaintiff. It is true that we believed the evidence of the witness Robbe, but in addition there is the evidence of Samuel Baird who visited at the Jensen home, near the mouth of Dixon Gulch, between the middle of August until October, in 1925, who made tests of this water with some nails and found that there was sufficient copper in the water to produce enough copper on the nails after

about a week's time that it could be scratched off; likewise O. S. Jensen, who lived at the mouth of Dixon Gulch, testified that for four years, commencing in 1924, he had observed these waters and that there was a greenish stain on the flume, that the icicles on the cribbing had a green tinge, and that his children put iron and nails and an old clevis in the water about two years ago (1926) and that it showed a coating of copper colored matter all over the iron; likewise, Mrs. Jensen testified that the children had put numerous articles in the water, and that a substance was coated on the outside of them, and that the children brought them to her and showed them.

Counsel states that this copper content comes from the B. & G. fill. Assuming that to be true, where does this argument help plaintiff? The trial court found the fill to belong to defendants so far as the right to capture water thereon is concerned (Ab. 626).

This evidence given by both parties not only showed a substantial but also a continuous copper content in the Hays Spring waters for years before the dumps were placed in Dixon Gulch. Do we understand that the court is going to determine which part of the copper content of these waters comes from the dump and which part from the fill?

We doubt, however, if plaintiff can explain this situation by saying that this copper content comes from the fill. The fill was placed in Dixon Gulch in 1910. Plaintiff claims that the Hays Spring waters were potable and

good to drink until 1919 and 1920 and that there was a pool of water where the boys swam back of some vegetation and reeds and rushes. The copper seems to have appeared in 1919 or 1920, because Mr. Connary testified that there was acid and copper in the water in 1919 to such an extent that they could not use it for their carbide lamps, and Mr. Robbe testified that it contained copper in 1920. Plaintiff now says that these dumps and fills start giving off copper immediately, and that it takes four or five years before they start giving off commercial solutions. If that is true then this fill should have been giving off copper immediately following 1910.

Again we must conclude with Dr. Pack and Mr. Crane that undoubtedly the copper content in the Hays Spring waters is from various sources; from the fill, from the springs in Picnic Flats, from plaintiff's dump in Dixon Gulch, and from all the ores and rocks upon and within the Dixon Gulch surface and sub-surface drainage areas (Ab. 403-404).

THE EXPERIMENTS.

Counsel has quoted at great length and gusto with reference to three experiments which were made by the pouring of water at various places. We are surprised that plaintiff refers to them, because they certainly turned out disastrously for plaintiff.

Experiment No. 1: The water was placed on the top of the B. & G. fill (not the Utah Copper dumps) in great quantities from a two-inch pipe. It was turned on at

1:25 P. M. and the Hays Spring showed an increase at 8:00 P. M. (Ab. 329).

As to the second experiment counsel for plaintiff seems to have gotten all mixed up. The Hays Spring figures are quoted for the drain tunnel, and the drain tunnel figures are quoted for the Hays Spring. In other words, it was the B. & G. drain tunnel which was flowing 6000 gallons per twenty-four hours when the water was turned on, and which was flowing 61,920 gallons per twenty-four hours one hour later, and reached a maximum flow of 108,000 gallons by 5:05 P. M. The Hays Spring showed a slight increase as a result of this flooding, but it was shown (Ab. 323 and 327) that this increase was surplus and overflow from the drain tunnel. The water was coming through the drain tunnel and down the mountain into Dixon Gulch in such quantities that the flume could not contain it, and it was splashing over into the Hays Spring. The increase of water coming through the drain tunnel accounted for all of the water that was poured in this experiment (Ab. 324).

It will therefore be seen that counsel for plaintiff was arguing against himself in citing this experiment, and all of the good things which counsel intended to infer from this experiment, as demonstrated on page 43 of their brief, were for the Hays Spring, and the bad things intended to be shown have to do with the drain tunnel.

The third experiment was on November 1, 1928. The water was poured on the dump immediately above the

old placer gravel beds, which are plainly to be seen in the cut for B. & G. Railway. These gravels pass beneath the B. & G. fill. The water was turned on at twelve o'-clock noon, and the first increase in the Hays Spring was at 10:04 P. M., and the maximum was reached at eleven A. M. on November 22nd.

The first experiment showed nothing excepting that if you poured water on the top of the B. & G. fill it would sink. No one ever doubted that. The second experiment established beyond all question of a doubt that water going down through the dump flooded the area back of the B. & G. fill and passed into the drain tunnel. The third experiment showed that after many hours waters which are placed upon the dump above the old placer gravels will eventually seep and percolate down to the Hays Spring, or that the flood area back of the fill can be flooded to such an extent that it will pass out laterally through the fill. Of course, if you pour enough water upon anything you will flood it.

These demonstrations did not prove the source of the Hays Spring waters at all. Dr. Pack discussed these experiments and the reliability of them, and stated that no pouring such as this could be regarded as a duplicate of nature's slow process, and that the information obtained in that manner proved nothing of value in this case (Ab. 399-400).

THE REAL QUESTION IS NOT WHERE DID THE COPPER COME FROM BUT, WHO DOES IT GO TO?

Defendants gladly accept the challenge of plaintiff to discuss and have this appellate court pass upon all the evidence presented by both sides with reference to the geological case, and with reference to all other issues raised by defendants' answer. The evidence is impartially and fairly abstracted and will not be difficult to follow. We welcome plaintiff's challenge to a reconsideration of those issues of fact.

In presenting this case to the appellate court, however, we did not feel that it was necessary to place upon the appellate court the burden of reviewing these facts, and hence based our appeal upon the undisputed facts and the law relating to them, and took the position that regardless of the course or source of these waters within Tract D that they belong to defendants, and that before anyone can take the ground they must pay the value thereof, including the value of the water.

Instead, however, of answering or even attempting to answer defendants upon the propositions of law presented by the appeal, plaintiff, like the fellow who answered with reference to the rule in Shelley's case, thought it was a good idea to discuss something entirely different from that which is presented by the appeal and to lure this appellate court away from the questions on appeal by unfairly, with great partiality and inadequately, presenting some of the evidence considered by the

trial court, and only such evidence as plaintiff deemed to be favorable to its side. Apparently counsel for plaintiff cannot meet the arguments contained in law points I and II as presented by defendants.

We shall therefore simply conclude that these waters occurring at the Hays Spring, north incline shaft, south incline shaft, Hays upper cut, Hays lower cut, and in the catchment upon Tract C come from various sources and derive their copper content also from various sources. They do not have the same chemical composition as the Utah Copper Company dump waters as collected in the drain tunnel, and contain a very high percentage of silica, which could not have been picked up in the course of a trip through the B. & G. fill consisting of only a few hours. Glass is made from silica and is practically indissoluble in the presence of water, and yet the Hays Spring waters contain a great deal more silica than the waters in the drain tunnel, showing that these waters have been in contact with quartzite for a long period of time, so as to accumulate such a burden of silica. The same is true of other elements in the water. (See Crane, Ab. 357-360, as corroborated by Harms, Ab. 447-448).

We could go on indefinitely, as did plaintiff, and re-abstract and re-tell all of the evidence presented by defendants, which made it so difficult for the lower court to decide the case. We will not do so and simply ask this appellate court to disregard these arguments

upon disputed facts with reference to the geology, and decide the questions of law presented *by the appeal.*

What answer, therefore, has plaintiff made to the law argument made in law points I and II by defendants? The answer comes back, "none".

What difference does it make where the copper comes from?

We assume, of course, with argument that this court is going to regard copper water as water the same as sulphur water, salt water, and any other water containing mineral. The source of the mineral has nothing whatsoever to do with the title to the water and has no bearing on the case whatsoever, excepting as trying to determine the source—and since this water had copper for years before the dumps were placed in Dixon Gulch and had a substantial content in 1924, 1925, 1926 and 1927 we do not see how this court, or any other court, can say what part of the copper content came from one source and what part from another.

The expert witnesses for plaintiff testified that the porphyry dyke which passes through the Smith (Hays) tunnel workings on the right hand side of Dixon Gulch, and which shows at the Hays Lower Cut, is connected with the porphyry showing near the south incline, and that in their opinion this is a dyke which extends up across lower Dixon Gulch so as to cut off the downward course of the subterranean waters in Dixon Gulch. This was fine theorizing and is an excellent example of what

counsel for plaintiff says with reference to theorizing versus actual facts. The Smith (Hays) tunnel enters the mountain at the rear of some houses on the right hand side of Dixon Gulch. It follows this porphyry occurrence for some distance, and it makes a sharp turn to the left, passing through the porphyry and out into the quartzite. The court will observe, therefore, that this quartzite that they passed into would be below the porphyry and this so-called porphyry dyke would lie between this area and the upper portion of Dixon Gulch. The point where the Smith tunnel went out through the porphyry and into the quartzite was just on the right hand side of Dixon Gulch near the Hays lower cut (Ab. 209). Mr. Bowman, the old miner who testified for plaintiff and who worked in this tunnel, testified (Ab. 185) that just as soon as they got out of the porphyry and into the quartzite they got a good stream of water. Mr. S. J. Hays testified (Ab. 241) that lower Dixon Gulch is a veritable ocean and you can develop water anywhere. This was also the statement of Judge Kenner (Ab. 301).

Plaintiff states that this copper solution is an artificial product produced by plaintiff's industry. This dump material is waste matter which they were glad to get rid of. The only industry that plaintiff put in on the matter was to haul it away because they could make no other use of it, and dump it in the gulch.

It is nature's copper and the meteoric waters which descend upon the dump are a free gift of nature.

ALL WE (BOTH PLAINTIFF AND DEFENDANT) WANT IS THE COPPER.

On page 17 and again on page 91 of plaintiff's brief a point is attempted to be made by the assertion that all the appellant wants is the copper in the copper solutions in Tract D. We admit it, both for ourselves and for the plaintiff, if there is anyone in this case who wants simply the water and not the copper in the water solutions, he, she, or it is a strange personality, but to say that the appellant wants appellant's copper solutions is to bring no railing accusation against the appellant, and this law suit is being tried not to determine a moral but a legal question. The moral question will arise after the action is terminated and we will then discover whether or not either party to the action wants copper solutions belonging to the other party, and whether or not, the matter having been determined, the party against whom the determination falls will promptly desist from its effort to acquire the copper solutions belonging to the other party and also promptly account for those already taken.

THE CHARGE THAT THE DEFENDANT HAS MISLED THE PLAINTIFF AND THAT THE PLAINTIFF ONLY NOW DISCOVERS THAT THE APPELLANT HAS AT ALL TIMES CLAIMED THE WATERS IN TRACT D.

On pp. 75 and 76 of respondent's brief the suggestion, whether humorously or not, is made that because in the stipulation a bond of only ten thousand dol-

lars was exacted, defendant is either limited in its demand to that sum or thereby gave plaintiff the right to suppose that defendant regarded ten thousand dollars as the limit of defendants' damages for occupation and collecting of waters in Tract D in case the plaintiff fails in this action. We say that we find it difficult to determine whether or not this argument is seriously advanced or only humorously suggestive, and our difficulty is increased by reason of the fact that contact with our brothers on the other side does not warrant us in regarding the soul-saving grace of humor as one of their fortunate possessions; otherwise we would conclude that the suggestion that plaintiff has been misled as one advanced either with the tongue in the cheek or the twinkle in the eye. From the start defendant has claimed that the plaintiff in taking the copper solutions in Tract D was taking the defendant's property. A bond of ten thousand dollars was regarded as a sufficient bond, not because it was felt that the possibilities of recovery in this case were in any way limited to a bond. On the contrary, defendant has always regarded the plaintiff as amply able without a bond to respond to any judgment that might be recovered against it. But by de-defendant's pleading plaintiff was warned that it was taking defendant's property while it occupied "pending the action" and "without prejudice" the property of the defendant.

There is another incident of this action which may well be considered in this connection and that is the fact

that none of the parties hereto ever dreamed that it would take four years to determine as serious an action as this is in its effect upon the rights of the parties. The court will discover in the transcript (p. 4027, January 17, 1931) that one year and a half after the case had been tried a motion was made in the lower court that the plaintiff be required to account for the copper waters it had taken and to impound the proceeds from the sale of such copper waters. At the time this motion was brought to the attention of the court the trial court announced that within a short time a decision would be rendered. It is only because of the death of the late Morris L. Ritchie and the necessity of a rehearing of the case by his Honor who finally disposed of it on the trial, and the great length of time required in reaching the decision by the lower court, that the amount of the bond in this case is so insignificant in comparison with the actual values involved. It will be noted that the decision in this case was rendered by the trial court on March 3rd of this year, and that the appellant has brought the case into the appellate court with record speed. No delay in bringing this action to a prompt conclusion can be charged upon the appellant.

In this connection, on page 76 of respondent's brief we are charged with having charged the authors of respondent's brief with being "cute". Reference to our brief will disclose that there was nothing personal in our characterization. The argument that the occupation of the defendant's premises and the collection of

copper solutions therein by the plaintiff authorized by the order of occupancy "pending the action" and "without prejudice" changed the ownership of the solutions from the plaintiff to the appellant is characterized "as 'cute', as 'tricky', a piece of legal legerdemain, as the annals of the law disclose." It was the argument and not the arguer who was referred to as "cute"; and after reading the argument of appellant in its brief in which the original argument is but repeated, we still think our characterization accurate.

WHAT WAS THE LEGAL EFFECT OF THE STIPULATION AND THE ORDER OF THE COURT PERMITTING PLAINTIFF TO OCCUPY TRACTS A, B, C, AND D IN JUNE, 1928 "WITHOUT PREJUDICE" AND "PENDING THE ACTION?"

Plaintiff does not get down to discussion of the legal effect of the stipulation and the order of court permitting plaintiff to occupy Tracts A, B, C, and D in June, 1928, but confines itself to repetitious pronouncements. Listen to the following pontifications taken from pp. 79 and 80 of plaintiff's brief:

> "Title to such water while in plaintiff's dump before processes of nature have converted it into the valuable copper solution that defendants so much desire, is in plaintiff, and after these natural processes have converted the water, the property of plaintiff, into a thing of value in the form of a copper solution, by leaching out and carrying in such solution the valuable copper in plaintiff's dump, also the property of plaintiff, the solution continues to be and is plaintiff's

property. This copper solution is an artificial product composed of ingredients all of which are the property of plaintiff. That solution is a definite, definable and identified substance from a known source, the property of plaintiff, and as it falls upon the surface beneath the dump, trickles, seeps and flows on and above bedrock in the bottom of the gulch over the channel plaintiff has condemned across defendant's property, it is still such definable, identified substance, traceable and traced from such known source wherein it was the property of plaintiff, wherein the copper was the property of plaintiff, *admitted to be such by defendants,* the product of plaintiff's industry, mined by plaintiff, transported and deposited upon that dump by plaintiff and now as plaintiff's property collected by plaintiff in its intake and conveyed away to plaintiff's precipitating plant, where the copper therein contained, plaintiff's property, derived from plaintiff's dumps, is being preserved for plaintiff, its owner."

The foregoing declaration is introduced on pp. 78 and 79 by the statement that "These copper solutions while in plaintiff's dump are the personal property of the plaintiff, the very corpus of which plaintiff owns" (p. 78); and "Their character is unchanged" (on Tract D), "the personal property of the plaintiff always identified, never abandoned and never have they become true percolating waters." (p. 78). Before the statement that copper solutions are personal property, the plaintiff quotes on pp. 78-9 of its brief a brief part of a sentence from Utah Copper Company v. Montana-Bingham Consolidated Mining Co., 69 Utah, at pp. 430-431, in which

the court says that in that case the waters carrying copper "so long as they are in the dump and considered part of it, * * * are like the dump itself, the property of the plaintiff; that it is as lawful for the plaintiff, so long as the waters are in the dump, to collect and remove them as it is to remove the dump itself; * * *". It should be remembered, however, that in the case referred to by agreement between the parties the dump never became a part of the fee, and the whole theory of the Montana-Bingham case is that by agreement between the parties the owner of the dump reserved the right to remove the dump and therefore the water itself part of the dump as against the owner of the fee. It is familiar law that parties may by agreement prevent what would otherwise become attached to the real property and thereby become real property and so continue its character of personal property. It may, therefore, be true that in the Montana-Bingham case neither the immense dump nor the copper solutions contained therein became real property, though the court does not so expressly hold, and counsel has cited no other authority for its suggestion that the copper solutions in the dump in this case are personal property. On the other hand, as distinguished an author as Wiel in his highly regarded work on "Water Rights", (3d Ed.) at p. 30, says that until water is taken into a receptacle and there actually confined, it is not severed from the land itself and under the old holdings which support the "cujus est solum doctrine" in its entirety is regarded as a part of the

land and as real property. Plaintiff has not enlightened us and has cited no authority at all derogating from the authorities cited by us in our original brief that property in water is of peculiar character, and ownership consists in the possibility of capture while in or on the land of the owner with the right to exclude a trespasser. See Wiel, Sec. 34 and 35.

Wiel, in Sec. 35, states the doctrine as follows:

> "The analogy to animals ferae naturae is finally shown by the authorities establishing that water reduced to possession is personal property. Just as wild animals, by capture becoming private property, are personalty, so likewise running water, severed from its natural wandering, and confined under private control in a reservoir, or other works of man that reduce it to possession, is also personal property.
>
> "The individual particles of water so impressed by diversion into an artificial structure or waterworks that confine it, and become *private* property, possess none of the characteristics of immovability that go with ideas of real estate; they are still always moving though privately possessed, having, as particles, the characteristics of personal property."

The author cites, among other cases, Bear Lake & River Waterworks & Irr. Co. v. Ogden City, 33 Pac. 135, where the court says at p. 136:

> "Water flowing in a natural stream or in a ditch is not subject to ownership, so far as the corpus of the water is concerned. The right to use it is a hereditament appurtenant to land. This

> is the right that is exempt from taxation in cases where the land to which it is appurtenant is subject to taxation. But water in the pipes of a distributing system is personal property. The ownership is in the water itself. It was, at common law, the subject of larceny, and it is not appurtenant to any land."

While the foregoing statement is made with reference to water flowing in a stream, we know of no distinction between flowing and percolating water as far as a change from real to personal property is concerned.

"UNLESS PLAINTIFF IS PERMITTED TO RECOVER ITS PROPERTY AS PLAINTIFF PROPOSES, PLAINTIFF'S COPPER SOLUTIONS WILL" BE LOST.

On p. 91 of plaintiff's brief plaintiff says: "Unless plaintiff be permitted to RECOVER its property as plaintiff proposes, plaintiff's copper solutions will flow thence on down into Bingham Creek and to waste, or into the possession of others who, like the defendants in this case, neither own them nor have any right, title or interest in them."

We think plaintiff has unconsciously indicated the weakness of plaintiff's case by plaintiff's pleadings and certain parts of plaintiff's brief, noticeably by the foregoing quotation. In plaintiff's complaint (para. 13, Ab. 12) plaintiff alleges: "In order, also, to collect such waters containing said copper in solution as aforesaid, and to enable the same to be conducted through said pipe lines to such precipitating vats or tanks, it is necessary

and essential to excavate and construct tunnels and short branches therefrom beneath the surface of a portion of the properties and premises of said defendants above named; and to utilize as a conduit for the purpose of conducting the said waters holding copper in solution and percolating through the said dump or deposit of ores so as aforesaid deposited and placed upon the surface of the property and mining claims of this plaintiff in Dixon Gulch, that portion of the said Dixon Gulch, extending across a portion of the said property of said defendants'' etc. In other words, after the solutions in plaintiff's dump leave the dump and leave plaintiff's property, plaintiff cannot get them unless it gets them on defendant's ground. But it is a misnomer in law to say that the solutions are owned by the plaintiff when they reach defendant's premises. There they are owned by the defendants, and this is an action the purpose of which is to acquire title to copper solutions which the plaintiff does not own and has absolutely no right to capture or control in defendant's premises.

Plaintiff realizes the force of the argument that in order for it to acquire title it must capture, control, and confine water. For this reason plaintiff attempted in its first proposed findings of fact to induce the court to find as a matter of fact that the dump was a reservoir or a receptacle. This the court declined to do. Plaintiff then attempted to get the court to bring the railroad dump within the Montana-Bingham case by holding that the railroad company had a right to remove the railroad

fill and that since the railroad company had given to the plaintiff the right to use the railroad fill for all purposes, the plaintiff could remove the copper solutions from the railroad fill at the toe of the fill. But the court held that the rights of the railroad company in its right of way over the land owned by the plaintiff was a right of way for strictly railroad purposes, and that the railroad could not mine on the right of way, (Tr. 3714, 3747, 3764, 3789) and now plaintiff abandons its original contention as to what it could take from the railroad company adversely to the defendant, and contends that it has by condemnation acquired the right to collect and remove waters, in other words, that condemnation is a substitute for contract. A contract operated in the Montana-Bingham case, now a condemnation should operate.

The books in discussing the nature of water use the old descriptive words "ferae naturae", wild by nature—and all say that water is not finally owned and title not finally acquired until the water is captured or reduced to possession or control on the analogy of the wild animal which was not owned until restraint was imposed. Using this same analogy, suppose that a herd of wild animals were confined within an inclosure the larger part of which was owned by A and a small converging neck was owned by B, but that the nature of the animal compelled it inevitably to pass from the large tract into the neck owned by B. Would the law listen a minute to the suggestion that A should be permitted to acquire the land of B? And if A were to say, "The animal belongs to me and not to

B, therefore I should be permitted to condemn B's land", the purpose of A would be perfectly apparent and equally unpermittable. The court if appealed to would say to A, "You are mistaken about your ownership of these animals. They are wild by nature and belong to the one who first captures them. If you do not choose to capture them on your own ground, you cannot be permitted to deny to B the right to capture them when they leave your ground and reach the ground of B. These animals belong finally and ultimately to the one who captures them, and before capture they belong only in a potential sense to the one on whose land they are at a given time. If you want the animals, capture them on your ground or buy from B the right to capture them on his ground." And suppose, under such circumstances under the provisions of law which permit occupation "pending the action" "without prejudice", A can occupy B's ground under the claim of A that he owned the animals and that B did not own them, and that the law permitted A to acquire the land of B, the court were to order B to let A occupy B's land, and after these animals came from A's land onto B's land A were to capture them on B's land, but that later, after reviewing the facts and considering the law, the court were to say, "A, you are wrong; you neither own the animals nor have a right to condemn B's land." Does anyone think for a minute that A would be permitted to reply, "I may not have had a right to condemn B's land and may not have the animals which were on B's land at the moment of condemnation, but

having come into possession 'pending the action' 'without prejudice' to B's rights of B's land, I then captured such animals as came onto B's land, and because I was in possession under the order of the court for my purpose to capture the animals, they belong to me." We think that the argument of A would make little impression on the court.

The same illustration might be used with reference to fish in a stream, part of the stream being owned by B and part being owned by A, and the fish, because of their nature, or for other reasons, inevitably coming from that part of the stream owned by A into that part owned by B. Would the court be impressed with the argument of A that he should be permitted to condemn that part of the stream owned by B so as to capture A's fish which were A's only if captured on A's part of the stream and B's if captured on B's part of the stream? We think not.

The same thing would be true about gas. Suppose A and B owned a gas dome, B the greater part of the dome and A only a small part. Would A be permitted to condemn B's part? We think not.

Each particle of water as to such particles of water as came from the dump, and we deny that all of it comes from the dump, but as to each particle of water as it seeped and percolated through the dump, the plaintiff had the right not of consummated, final title, but the right to capture and thereby acquire a final title to such

particle of water; but as each particle of water passed toward the east such particle finally reached the eastern boundary of the plaintiffs' land, and in passing that boundary, in law it said "goodbye" to the plaintiff and "how-do-you-do" to the owner of the land into which it passed. Finally as to each particle reaching the western boundary of the appellant's land, it there greeted the appellant not with a frown of alien hostility, but with a fair and open and impartial countenance stamped with the approval of the law, and said to the appellant, "I am yours if you take me." The only event that has occurred in the history of the constantly recurring progress of water from the dump (that is, as to such water as comes from the dump) that plaintiff suggests as changing the situation is an order entered on the 13th of June, 1928, as the appellant always thought, in good faith and fully protecting the right of all the parties until the controversy was finally determined. The order was entered "without prejudice" based on a stipulation "without prejudice", signed by the parties by their honorable representatives, permitting the plaintiff "pending the action" to occupy land owned by the appellant "without prejudice", and there to collect waters which had passed from the plaintiff's dump (that is, such waters as actually had been in the dump) and from the plaintiff's land into the land owned by the defendant, and in so passing had passed from the qualified ownership of the plaintiff to the qualified ownership of the defendant and which water was finally captured by the plaintiff "with-

out prejudice'' on and in the land owned by the appellant but which the plaintiff occupied ''pending the action'', ''without prejudice''. If out of that order it is possible for the plaintiff to create not a change in title, but, according to plaintiff, a mere continuation of title, notwithstanding there had been no consummation of title by capture of the water in the dump, and notwithstanding the passage across the boundary separating plaintiff's ground from its neighbor, but simply by reason of the order of the court permitting occupancy of plaintiff's land until the issues of this controversy are determined, as the plaintiff contends, we cannot read the law.

PLAINTIFF IS NOT A TRESPASSER IN OCCUPYING DEFENDANT'S PREMISES BUT IS A TRUSTEE.

Plaintiff says that the order of the court removed the ban of trespasser against plaintiff in occupying Tracts C and D. We agree; but it did not change title to Tracts C and D, nor to the waters flowing into Tracts C and D. Plaintiff ceased to be a trespasser and it became a trustee in duty bound to account on final determination against its contention to the appellant for its acts while in possession ''pending the action'', ''without prejudice''. Plaintiff will admit that it could not have crossed the western boundary of defendant's land before the order of court permitting temporary possession and have captured the waters flowing in appellant's land without being a trespasser, and we think it is just as clear

that plaintiff would not only have been a trespasser, but after it had taken the water flowing from Tract D, it would have been a thief. Plaintiff claims that the result was in some way modified by the order of the court, but plaintiff dare not come down out of nebulous generalities and argue this matter out as a matter of common sense and authority. It is a very easy thing to say "we are the owners" in this situation, but it is a very difficult thing for plaintiff to put its feet squarely on the ground of authority and the law.

Weil, Section 37, has this to say about the matter:

> "ESCAPED OR ABANDONED WATER—The water taken into an artificial structure and reduced to possession is private property *during the period of possession.* When possession of the actual water or *corpus* has been relinquished or lost, by overflow or discharge after use, property in it ceases; the water becomes again nobody's property and re-enters the negative community, or 'belongs to the public,' just as it was before being taken into the ditch. It has no earmarks to enable its former possessor to follow it and say it is his. The specific water so discharged or escaped is abandoned; not an abandonment of a water-right, but an abandonment of specific portions of water, viz., the very particles that are discharged or have escaped from control."

For fear it should be suggested that while the foregoing is true as to running water it would not be true as to an underground stream or as to percolating water, but which suggestion would not be true under the modern doctrine, See Weil, Section 1100, under the title "NO

LONGER PRIVATE PROPERTY IN ITS NATURAL STATE."

In the court below plaintiff argued that by reason of an arrangement it had with the railroad company plaintiff could "convey" water through the railroad fill without losing title, and since the railroad company could remove the railroad fill at its own will, it could give to the plaintiff the right to remove the water in the fill, an attempt being made, apparently, to get within the doctrine of the Montana-Bingham v. Utah Copper case. This theory has disappeared in the progress of this case from the trial court to the appellate court, and it emerges in an attenuated and undefined assertion without any reference to the record whatever, that the railroad company occupies "exclusively" the land over which it has an easement by condemnation or contract. This assertion that the railroad's right of way is one of "exclusive" character is repeated at several places in plaintiff's brief. Again plaintiff cites no authority in support of its declaration that the use by the railroad of the right of way is exclusive. There is no such authority. On the contrary, the authority is that a right of way is not exclusive as against the owner in fee as to any use which does not interfere with the railroad's use for railroad purposes, and particularly that a right of way gives to the railroad no mining rights. The railroad cannot confer upon the plaintiff what it does not possess and cannot deprive the appellant of what the appellant retains, that is, all mining rights in the right of way including the

right of way as modified or changed in confirmation by the railroad fill.

Plaintiff has not ventured to discuss any of the decisive considerations surrounding the securing of possession of the defendant's land by the plaintiff by virtue of the stipulation and order of the court in the condemnation proceeding. No discussion or citation of authority it attempted with regard to the nature and limitations of the plaintiff's rights in the copper solutions while they were in the dump and the points made by appellant in its brief that the title to the water is a mere limited title, the right to capture and exclude others from capturing while in the dump; that this limited title is lost when the water passes from the plaintiff's premises and a similar qualified title vests in the appellant; that while the appellant may not compel the plaintiff to continue to permit its waters to escape into the land of the appellant, the plaintiff may not follow such waters; and that when such waters are captured in the land of the appellant there is a final, consummated title in the appellant.

The only suggestion of an explanation of the basis of plaintiff's contention that the waters captured by plaintiff in catchment C since plaintiff went in to possession "pending the action" and "without prejudice" on June 13, 1928, is that plaintiff by the order permitting occupation was not a trespasser in such occupation. It is true that plaintiff was not a trespasser after the order

of June 13th, 1928, but plaintiff became a *trustee* for the appellant in case it was found at the end of the path we are pursuing that the plaintiff could not condemn Tracts A, B, C, and D.

We will be aided in reaching a conclusion as to the character and rights incident to plaintiff's occupation of appellant's ground by considering what would have been the effect had their been no order of occupancy. We suppose there can be no doubt that if there had been no order of occupancy the appellant could have collected the copper solutions in Tract C and in so doing would have owned them absolutely. It would have helped considerably if plaintiff had discussed this point and have conceded it on the appeal as plaintiff did on the trial, so that we are able to say without an order of occupation, "pending the action" and "without prejudice", plaintiff was the owner of the copper solutions seeping and flowing in Tract D and captured in the catchment on Tract C. Plaintiff has not attempted to meet our citations on pp. 91, 92 and 93 that the words "without prejudice" mean that the thing done "without prejudice" is as though it had never been done. In the present case neither the fact of the entry of the stipulation, the order of occupancy "pending the action" and "without prejudice", nor the actual occupancy of the plaintiff, has any place whatever in the determination of whether or not the appellant is the owner of the copper solutions seeping and flowing in Tract D. If the entry of the order "without prejudice" and "pending the action" is given any ef-

fect whatever in changing title and ownership to the copper solutions, in the degree that it is given effect, there is a departure from the stipulation and order that it should be "without prejudice". If the order is without prejudice then the occupation is without prejudice, and if the occupation is without prejudice, it necessarily follows that whoever was the owner prior to the order and the occupancy is now the owner; there has only been a change in the person collecting the solutions, not in the ownership of them; the change being one "without prejudice" and only "pending the action"; and whether or not the plaintiff must pay for the copper solutions it has been collecting from Tract D will depend upon whether or not the appellant was the owner before the order of occupancy and therefore continued to be thereafter; and if for any reason the court permits the condemnation of Tracts A, B, C, and D in permitting condemnation the court will require that the appellant be paid for every element of value in these tracts including any waters percolating or flowing in the tracts.

Plaintiff, as it seems to appellant, fails to appreciate the fact that if you take land in which there is percolating water you must pay for the percolating water. As we have stated many times in this case, it is our contention that the appellant's premises cannot be condemned because such condemnation would mean that the right of the defendants to mine on their own premises would be transferred to the plaintiff, and the statutes of eminent domain contemplate no such result. On the other hand,

we are clearly of the opinion that if the plaintiff may condemn the defendant's premises, in doing so it must pay for the valuable percolating, seeping and flowing copper solutions therein.

Plaintiff has cited the case of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585, in which it was held that the underground waters of an entire valley were a reservoir and that since the waters moved in a certain direction, they constituted a subterranean stream throughout the entire valley. We will refer to this case again, but at the present time let us rely on the case for our proposition that in condemning land you must pay for all of the water seeping, percolating and flowing in it. The court in this case approved the following instruction:

> "You are instructed that, in addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land, and which does not constitute a part of the water of the river. This is usually called 'percolating water.' There is, however, no magic in the word 'percolating'; and the fact that any witness may apply that word, or refuse to apply it, to any particular class of waters of which he may speak, is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of waters is distinct from, and much greater than, their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of

it on this land, and they do not own its corpus, or its body, or the very water itself; and they have no right to take it away from the land and use it on other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there is in this land, not a part of the stream, they are the absolute owners of it, to the same extent and as fully as they own the soil or the rocks or timber on the land. Therefore, if by any means they can separate this water from the land, they have an absolute right to the water thus separated, and may conduct it away and sell or dispose of it anywhere as they see fit, subject only to the limitation that they may not excavate or do anything on the land for the mere purpose of intercepting such water, and preventing same from flowing into the stream or water course on the land of another, and without intending to make any beneficial use of it themselves. Whatever additional market value this land may have had by reason of the presence therein of water of this class, or by reason of the feasibility of separating it from the land, or of using it on the land, or of conducting it to some other place for use or sale, or of the great market value of such water for such purposes, or by reason of all these things combined, or by reason of any other lawful benefit or advantage which this water gives, this additional market value inures to the benefit of the defendants, and is a part of the compensation to which they are entitled in this case, as the value of the land to be condemned.

"You are instructed that, if the jury believe from the evidence that the subterranean waters in the land sought to be condemned are percolating without any definite channel, and that the same are not a subterranean water course or stream; and if they believe that such waters come onto

> said lands from the lands of others above, or pass from the lands sought to be condemned down to the lands of others lying below, and that such upper proprietors could, by the construction of tunnels or other works, cut off or divert said waters, or some part thereof, from the lands sought to be condemned, or that such lower proprietors could construct tunnels or other works on the lands lying below the lands sought to be condemned, which would have the effect of draining or depriving the lands sought to be condemned of their subterranean waters, to the extent that the owners of the land sought to be condemned could not make a practical use thereof, or of some part of said waters—then the jury are instructed that such upper and lower proprietors would have the same rights so to appropriate said waters on their lands as the defendants would have on the lands sought to be condemned; and the jury must take those facts into consideration so far as they diminish or destroy the value of the rights of the defendants to said waters, or such portion thereof as could be so diverted or drained so as to deprive defendants of the practical use thereof."

It will be noticed that in condemning a piece of land and taking waters seeping, percolating and flowing therein the court in the Los Angeles-Pomeroy case requires that the condemnor shall pay for the capacity *of the land to produce water*, and it will further be noted that this capacity is not limited to the water in the land at the instance of condemnation, but the condemnor was required to pay for the water which would come into the land in the future, subject to the possibility which limited the value of the water right in the owner of the land and the amount which the condemnor was therefore required

to pay for that water right by the fact that the owner of the dominant estate was free to cut off the flow of the water (if percolating) at any time and deprive the servient estate, which was condemned, of the continued flow. It will be noted, therefore, in the present case that if plaintiff is permitted to condemn Tract D and the waters seeping, percolating and flowing therein, the plaintiff will condemn the water producing capacity of this ground which included the right in the appellant to all waters which should flow, seep and percolate from the lands of the plaintiff into the lands of the appellant. Of course the plaintiff could cut this water off by capturing it on its own premises and by preventing its escape, but the ownership of all water flowing from the land of the plaintiff and into the land of the defendant ceased, in crossing the boundary between the land of the plaintiff and the land of the appellant to belong to the plaintiff and become the water of the appellant, and must be paid for. As a matter of fact, this, as plaintiff says, "interesting case" of Los Angeles v. Pomeroy clearly states the doctrine that in condemning a piece of land one must not only pay for the water in the land at the instance of condemnation but must pay for the likely or possible particle of water—it may be hundreds of miles away, or it may be at that time in the clouds, or it may be at that time in the gulf stream—which in the course of time will reach the land in question and, in reaching such land, be subject to capture. So in the instant case, the plaintiff in condemning tract D must pay the appellant

for the copper solutions seeping, percolating and flowing in plaintiff's dump which, unless captured and controlled on plaintiff's land, will escape into the land of appellant and be owned by appellant. It would have been "interesting" for the City of Los Angeles to have informed Pomeroy and his associates that in condemning its land all Los Angeles would have to pay was for the land and no water, that the water which would come into the land in the future would belong to the City of Los Angeles because Los Angeles would not be a trespasser upon the land it had acquired from Pomeroy.

We are dealing with old and fundamental principles in this case. The law relating to water is not the creature of our day but of many generations, and its principles have been tested and applied under varying circumstances and found to work out in the long run, everything considered, the fairest and most equitable recognition of rights, and such system cannot be disturbed or set aside because of the whims or supposed interests of a large mining concern as against a few individuals. What we get out of the case of Los Angeles v. Pomeroy is that you cannot take the water seeping, percolating or flowing in the land of another by condemnation proceedings *unless you pay for them*, and that is all that we can ask here if the court reaches the conclusion that this land may be condemned.

The logic of the plaintiff in this case would work out in a rather disconcerting way if it were applied to a valley in which there was situated six different mining

concerns owning mining dumps producing copper solutions at different elevations, the highest being owned by A and the lowest being owned by F. E would institute proceedings to condemn the land of F so as to collect its copper solutions on the land of F. Having succeeded and thereby educated its neighbor D, situate at a higher level, D would bring an action to condemn the lands of E, which would include those of F. Having succeeded, C would institute a similar action acquiring the lands of D, E, and F. B would follow, and finally A, having the land at the highest elevation, would become the owner of the lands of C, D, E, and F; and in so doing they would each in turn make the same argument as plaintiff makes in this case, that all they were acquiring was a ditch, and that having acquired possession by the preliminary order "without prejudice", "pending the action", the copper solutions which came into the servient tenement thereafter were "conducted", "conveyed", "carried" by them onto such servient tenement, and having possession of the servient tenement, they were not trespassers, and not being trespassers, would have entire right, not by agreement with the owner of the servient tenement, but by condemnation, as plaintiff in this case says in order to bring plaintiff's rights within its interpretation of the Montana-Bingham case, to collect the waters in question.

On pp. 102 and 103 of our brief we discuss the use of the words "convey", "carry", and "take" used by the plaintiff in describing the movement of such part

of the water as comes from plaintiff's dump to the intake at catchment C and suggested that plaintiff was arrogating to itself too much in the use of these words since they imply some control of the waters on the part of the plaintiff, while the facts demonstrate that the only agency at all concerned is the law of gravitation which plaintiff unconsciously is attempting to condemn in this action. The water in question falls like the gentle dew from heaven upon the earth beneath, which happens in this case to be the dump of the plaintiff, but the falling is no different than if the property were otherwise, and then seeps, percolates, and, perhaps, flows through the dump into the soils beneath the dump, and seeps, percolates, and, perhaps, flows through and out of the fill. Some of it perhaps reaches the bottom of the gulch and all of it rises in the toe of the dump on Tract D. How in the name of heaven can this progress be called a "conveying" or "carrying" or "taking" of the water by the plaintiff from the dump to the catchment, Tract D? The only reason why these words are used is that they imply some control of the water by the plaintiff, and plaintiff realizes that to perfect its title it must have captured, reduced to possession, and controlled this water on its own premises. It is for this reason that plaintiff toys with words which imply the capacity of the plaintiff to "carry", "convey", and "take" such part of the water as comes from the dump to the catchment from the plaintiff's land to the land of the defendant.

Again plaintiff's use of these words is poetical and has no existence in reality.

UTAH COPPER CO. V. MONTANA-BINGHAM CONSOLIDATED MINING CO., 69 UTAH 423, 255 PAC. 678.

Plaintiff argues that the basis of the holding in the Montana-Bingham case by the State Court is that the Utah Copper Company was not a trespasser on the dump and therefore had the right to take the water in the dump. This is not the basis of the court's decision. The basis of the court's decision is that by agreement the Utah Copper Company was the owner of the dump with the express *right* to remove the dump and could therefore remove everything in the dump. While plaintiff was not a trespasser it was something more than "not a trespasser". Plaintiff had the express right to remove the dump, in other words, it was the owner of the dump, and the solutions being a part of the dump, was the owner of the solutions.

MONTANA CONSOLIDATED MINING CO. V. UTAH COPPER CO., DECREE OF JUDGE JOHNSON.

In a second Montana-Bingham-Utah Copper case filed in the Federal Court, which is discussed by plaintiff on pp. 68 and 70, the Federal Court attempted a decree interpretive of the decision by the State Court. The Federal Court has not explained the basis of its decision and may well have held that since the right to remove

the dump existed, this included the right to remove the copper solutions on and in the easement. We do not know why the court held that the Copper Company could follow the solutions into the soils and onto bedrock under the dump, but we surmise that it was because the court felt that the right to remove the dump carried with it the right of doing everything necessary to make that removal effectual and beneficial. In any event, the rights were based on agreement between the owner of the dump with the right of removal and the owner of the servient estate burdened with the duty of permitting the removal. But all of the comfort which plaintiff may be able to get out of the Federal case stops short of any aid in the case now before the court, for the decree in the Federal case expressly ends all claim, ownership, or right in the plaintiff to the copper solutions when "the same shall have flowed out and seeped and percolated in and through the soil on the plaintiff's mining claims, laterally beyond the periphery of said dump or deposit and off of and from the surface right, interest and estate heretofore conveyed to defendant"; and in another place in the decree "the right continues until" (and then ends) "when the copper solutions shall have flowed out and seeped or percolated in and through the soil of the plaintiff's mining claims (Montana-Bingham Company) laterally beyond the periphery of said dump or deposit and off of and from said surface right, interest and estate of the defendant" (Utah Copper Company). On page 71, after quoting from the Federal Montana-Bingham case

and then from the opinion in the State case, and having stated that the only difference as far as plaintiff can see is that "in the case at bar the two estates are laterally contiguous", while in the Tiewaukee case the dump was superimposed upon the claims of the mining company, plaintiff asks, What is the difference? We are more interested, however, in the fact that plaintiff has cited the Federal case as in some way sustaining its position here, notwithstanding the fact, which plaintiff has not referred to nor attempted to explain in any degree, that the court in the Federal case in a decree prepared and submitted to the court by the plaintiff actually, expressly, twice, found that there was a difference, and that as soon as the solutions seeped "laterally beyond the periphery of said dump or deposit," the title of the plaintiff ceased and its right to capture the solutions ceased. Instead of asking appellant to explain the difference it seems to us that it is incumbent upon the plaintiff in citing this case to attempt some reconciliation between the express limitation of the decree in the Tiewaukee case as to water seeping or flowing "laterally beyond the periphery of said dump or deposit". The difference between the right to collect the water beneath the dump and the denial of the right when the water flowed laterally beyond the dump is, as it seems to us, perfectly obvious. The court held that by agreement the plaintiff in the Tiewaukee case in the Federal Court had surrendered the right otherwise possessed to collect the copper solutions in its own ground beneath the dump, but that that agree-

ment did not extend to the solutions seeping or percolating in the property of the plaintiff beyond the periphery of the dump. It was purely a *matter of agreement* and rests upon the sound basis that you may agree to part with what you own. The question in this case is not what may be done by the owner with what he owns, which was the question in the Tiewaukee case, but whether or not the plaintiff in this case actually owns what the Montana-Bingham Company was expressly decreed to own in the Tiewaukee case, that is, all copper solutions percolating, seeping or flowing in its property to which it has not voluntarily and by agreement surrendered its rights. On page 71, after referring to the Montana-Bingham case, and noting that the copper solutions which the Copper Company was permitted to follow and capture were those in and beneath the dump, but in this case are laterally by hundreds of feet from the dump, plaintiff says: "But what do these defendants think this suit is for? Not being able to acquire by contract the right to convey these solutions over and upon the premises of the defendant, plaintiff found it necessary to institute this suit by which to condemn that right, and, pursuant to the order of court entered into possession of that part of the defendants' premises required for that purpose, and exercising the right so conferred upon plaintiff in and upon those premises, plaintiff proceeded to and has at all times since under that right, conveyed its copper solutions from its dumps down to its intake." The foregoing statement is a mass of

twisted perversions. In the first place, we deny that the plaintiff ever attempted "to acquire by contract the right to convey these solutions over and upon the premises of the defendant". The plaintiff never sought to convey the solutions over the premises of the defendants. If plaintiff had attempted to secure a contract to convey its solutions over the premises of the defendants, there is no doubt but that it could have secured such a contract. But, be it remembered, conveying implies control, and powerful as the plaintiff thinks it is, it does not convey by simply permitting the law of gravitation to exert its influence. Conveying implies control and possession, and the only way in which the plaintiff could have conveyed solutions over the land and premises would have been to have captured on its own land solutions in its dump and by some means which would have confined such solutions and not permitted them to escape, such as by means of a pipe line have taken them across appellant's premises. Appellant would never have objected to this; but plaintiff has never attempted to secure such a right. It is, we think, for the same reason, a perversion for plaintiff to suggest that because of the refusal of defendant, plaintiff "found it necessary to institute this suit by which to condemn that right" (right to convey water across defendant's premises); and it is also wholly inaccurate to state that plaintiff "pursuant to the order of the court entered into possession of that part of defendants' premises required for that purpose". What the plaintiff is doing is capturing on defendant's

land defendant's copper solutions. They have never been reduced to possession by the plaintiff at any other place than on the land of the defendant where they are owned by defendant; and these waters have been permitted to escape from plaintiff's dump just as truly since the order of the court as prior thereto. The last statement that since the order of the court plaintiff has "proceeded to and has at all times since under that right, conveyed its copper solutions from its dumps down to its intake", ignores the conditional, tentative, preliminary character of the occupancy of defendant's premises by the plaintiff "pending the action" and "without prejudice".

If the plaintiff desires to secure the right to capture copper solutions in the servient estate in this case as it was permitted to do in the Tiewaukee case, it must do as it did in the Tiewaukee case, secure that right by agreement and pay for it, or, it must do as the plaintiff did in the "interesting case" of Los Angeles v. Pomeroy —purchase that right. We join with plaintiff in recommending the case of Los Angeles v. Pomeroy as "interesting" and add that it is instructive. As we think illuminating this entire question, may we ask what would have been the result in the Tiewaukee case had the Utah Copper Company in its agreement secured only a right to dump its waste material on the land of the Montana-Bingham Company? Would not the court have held under such circumstances that it had abandoned any copper solutions thereafter flowing out of the dump, and in

the present case, having acquired no right by agreement with the defendants to remove from the lands of the defendants any waters which may have escaped from the plaintiff's dump at a higher level, will the defendant be permitted, without paying for them, to take copper solutions from the lands of the defendant when there can be no doubt that the plaintiff would have had no right in the Tiewaukee case to have taken copper solutions from the dump, or, as the Federal Court held, beneath the dump (but not laterally) had the defendant not by agreement reserved the right to remove the entire dump and all in it?

It is absolutely certain that unless the copper solutions in plaintiff's dump are actually captured and controlled in the dump they will percolate, seep and flow into Tract D. This certainty is a property right in the owner of Tract D. This right in the owner of Tract D is not an absolute right and may be cut off and destroyed by the plaintiff capturing and controlling the solutions before they leave the dump, but the plaintiff's right to the solutions in the dump is confined to the dump, and the plaintiff has no more right to anticipate the right of the defendants to the solutions if they are permitted to escape and flow into Tract D by condemning Tract D and thus acquiring ownership to the waters even though they are permitted to escape and flow into Tract D than the owner of Tract D has to anticipate its ownership by extending a tunnel into plaintiff's dump and capturing the waters in the dump before they are per-

mitted to escape. The plaintiff owns the waters in the dump; the defendant owns the waters in defendant's ground. The plaintiff has the right to prevent the escape. The defendant has the right to capture after the escape. Neither can interfere with the other; and what the plaintiff is attempting to do in this case is to destroy the defendant's rights to capture the waters after they escape, when the only way plaintiff can preserve its title is to prevent the escape. It is because there is no escape from the conclusion that if plaintiff is permitted to condemn Tract D or catch the waters in Tract C, it will be mining the defendant's ground, capturing defendant's copper solutions and depriving the defendant of its own right to mine, that we say the court cannot permit the condemnation of the tract sought by the plaintiff. While the foregoing is absolutely true in fact and sound in law, as we see the law and the fact, the defendant nevertheless says that if the court for any reason can hold that the plaintiff is entitled to condemn the land of the defendant, it must pay for the certainty that valuable waters permitted to escape will reach defendant's lands and belong to the defendant, and that the plaintiff cannot condemn Tract D without paying for this potential right. It is the taking of our property without payment for all of its values, of values fixed and inhering in the land, those existing in enjoyment now and those which will accrue in the future—this valuable possibility that waters in the dump will continue to escape from the dump, this certainty that if it is permitted to escape from the dump

it will come to Tract D, a value just as true and existent as any other value—it is the failure of plaintiff to pay for all of these values that vitiates and destroys the soundness of the decision by the trial court.

It seems to appellant that the essence of this controversy is not difficult of ascertainment. For many years water has been flowing down Dixon Gulch and appearing approximately where it now does in the Hays Spring. This water has had a copper content for a considerable time. Since the dump of the plaintiff was deposited in the upper elevation in Dixon Gulch the copper content has increased and become commercial. These copper solutions have flowed and will continue to flow into the lands of the appellant. Whatever part of these solutions comes directly or indirectly from plaintiff's dump plaintiff desires to collect and precipitate. This plaintiff may legally do by capturing these solutions on its own property. If they are captured on plaintiff's property they may be conveyed by some means not permitting their escape, a pipe, for example, or a concrete lined ditch, and we have no doubt that if intercepted, collected and controlled on plaintiff's premises, plaintiff could, if it did not interfere with the rights of the defendant to collect copper waters on defendant's ground, actually convey these solutions across the land owned by the appellant, or, if possible, these solutions could be diverted into land not now receiving copper solutions from plaintiff's dump, or otherwise, by the plaintiff condemning such barren and non-productive lands as far as

copper solutions are concerned. But we think it just as certain, as a matter of law, that plaintiff may not condemn the lands into which these copper solutions have been flowing and will continue to flow unless they are controlled, captured, and reduced to possession in plaintiff's ground as any other principle of the law relating to water. What plaintiff is attempting to do is to abandon certain waters from its dump, permit title to arise in the appellant, and notwithstanding this change in title, take the title away from the appellant without paying for it. This plaintiff cannot do. We say "abandon" and "permit to escape". These expressions, in our judgment, are not accurate. They imply in some way volition on the part of the plaintiff. Ownership and change of ownership of water is in large part involuntary, particularly as to subterranean manifestations. The law creates the qualified ownership as to water in land and also ends the ownership when the water passes from the land. The will of the owner of the land has nothing to do with either the creation or the cessation of ownership. Such ownership is an incident of forces over which the owner of the land has no control. He does not permit water to escape; the water simply flows from the land through the operation of natural forces and flows into the land by the operation of natural forces, and the ownership arises and ceases by the operation of the same forces. We think plaintiff fails to appreciate or to give due force to the nature and limitations of ownership of water. This ownership exists in the owner of the land only while water

is in the land, and is a qualified ownership until the water is reduced absolutely to possession. If the water leaves the land of the owner, his ownership ceases. And it should not be overlooked that it is of the very essence of the nature of water that it is in constant motion and changes from place to place. It is this incident that gives to it its essence and distinctive characteristics which are recognized and have determinative consequences in the law relating to the accession and the termination of ownership of water.

IS APPELLANT APPEALING ONLY FROM THE WRITTEN MEMORANDUM OPINION OF THE TRIAL COURT?

Plaintiff complains that we have spent a great deal of time in arguing against the written memorandum opinion of the court and not against the judgment of the court (Brief page 74). If there exists any difference between the judgment and the written memorandum opinion of the court, if the judgment does not embody the written memorandum opinion, it would be very easy for plaintiff to point out this fact. Plaintiff has suggested no difference and we think there is no material difference. The judgment embodies the opinion. We, of course, do not contend that there is any reversible error in the opinion, but the opinion is embodied in the judgment and there is reversible error in the judgment, and the judgment is explained by the opinion and the force and effect of the judgment is illustrated by the opinion, and it is quite likely that it is because the opin-

ion discloses the nature and effect of the judgment that plaintiff objects to our referring to the opinion.

WHAT IS A DITCH?

It will not escape the attention of the court that plaintiff has been compelled to seek every eccentric and queer case in the books to attempt a support of its definition of a ditch. The railroad fill in this case was placed squarely across the gulch at right angles to the channel. It obstructs in great degree the flow of water down the gulch. The plaintiff contended that there was more or less open drain in the progress of the gulch due to the presence of large boulders in the making of the fill. The defendant contended that through the action of flood waters the fill was in large part sealed, but in any event as to all waters not reaching the absolute bottom of the gulch, the railroad fill itself served as a medium through which waters from the dump seeped and percolated. It was for this reason that the fill itself and everything above bedrock on Tract D is included within the area sought to be condemned. It is very difficult, if not impossible, to conceive a gulch across which has been placed a railroad fill with thousands of tons of material being a "ditch" and the gulch being condemned from bedrock up through surface soils and through the fill as a "ditch". As a matter of fact, plaintiff has contended throughout this case for the most fantastical propositions in the way of ditches, reservoirs and receptacles. In the original findings of fact as submitted by the

plaintiff, plaintiff asked the court to find as a matter of fact that the dump is a "reservoir" or "receptacle". This was objected to as being "poetical", and the court struck it out (Tr. 3802-7). Plaintiff's proposition amounts in the end to a holding that everything through, over, or along which water is conducted by the law of gravitation is a ditch. The definitions we have quoted in our brief require that a ditch shall have some definite boundaries confining water, such as a reservoir and a receptacle must have. The only boundaries of the "reservoir" plaintiff contended for were the blue sky above and the brown earth beneath, and the same unsubstantial character attaches to plaintiff's contention in this case regarding a ditch.

The character of the "ditch" contended for by plaintiff is well illustrated by the testimony of plaintiff's expert, Joseph J. Beeson (Ab. 500-3). Mr. Beeson was being cross-examined with regard to the physical conditions underneath the plaintiff's dump at the toe of the dump and up against the railroad fill and the course of the solutions from that point of capture on defendant's land in catchment C.

> "Q. What have you assumed to be the condition of the first flume from your lower wing of the upper portal of the drain tunnel, what have you assumed to be the condition of that terrain?
>
> A. I have assumed that to be—I hadn't really given it very much thought because my conception of the way those solutions, these copper waters passed through there is that they encoun-

ter instead of an impervious seal it is just semi-pervious, that is it simply prevents the flow from being rapid, and that the copper waters will eventually percolate through it.

Q. That is your seal against the toe of the fill?

A. Yes sir.

Q. You think that is semi-pervious?

A. Yes, I think it is.

Q. That the waters percolate downward through that and into the fill and percolate out through the fill until they reach the bottom of the gulch and appear down at the Hays spring, is that your idea?

A. That is right.

Q. Does that extend across the entire upward toe of the fill?

A. I should think so.

Q. So that when you said it flowed down through the fill, you didn't know of any particular channel in which they were coursing down through the fill, did you? You have seen no evidence of that, have you?

A. No, not of any particular channel except when it comes out, when I have observed it, it all came out at one place.

Q. I think you stated those waters are seeping and percolating in the fill, in the soil above the fill and above bed-rock, is that correct?

A. Yes, that is right.

Q. You observed the water percolation between bed-rock and the collar of the raise in the catchment tunnel, did you not, Mr. Beason?

A. Yes, I think I observed that."

* * * * * * * *

"Q. Is that the character, the same general character of water seepage and percolation you have described in your evidence—is the way the water leaves the fill and comes down to the point where it accumulates for the making of the Hays spring similar to that appearance that is in the shaft there or in the raise?

A. Yes, I think it is. I believe there are places in the bottom of the stream where the gravel would have a certain amount of mud in it and force more water to come out right in the bed of the stream than others."

The foregoing testimony indicates the kind of "ditch" plaintiff is attempting to condemn. The experiments plaintiff performed in which it took hours for water to go from the top of the railroad fill and from the dump illustrates the conveying characteristics of such a "ditch". These experiments are referred to in respondent's brief at pp. 42-4 and are also discussed in this brief at pp. 49-51. And see what Mr. Earl says about the course of the waters coming from the plaintiff's dump in his testimony abstracted at pp. 115-16 of respondent's brief. The course Mr. Earl defines is from anywhere to anywhere, just so the waters reach appellant's land and can be collected in the catchment on Tract C.

NECESSITY.

Plaintiff is entitled to very little consideration in this case on the question of necessity. Mr. Goodrich

testified that when the dumps were placed in Dixon Gulch they were thoroughly familiar with its characteristics and of the tendency of these dumps to give off copper solutions. They knew at that time that the Hays Spring waters were upon defendants' premises and that if the dump gave off solutions that they would probably go down through the gravels and soils beneath the dump, or seep and percolate through the fill and comingle with these waters. Mr. Goodrich testified fully with reference to this subject matter (Ab. 151-153). He testified as follows:

> "Q. At the time you commenced dumping in 1926 you or your company had a thorough knowledge and understanding of these dumps and their character and characteristics with reference to being reservoirs and sponges for water, all of them, didn't you?
>
> A. Yes sir.
>
> Q. Had all of that information?
>
> A. Yes sir.
>
> Q. Didn't you?
>
> A. Yes sir.
>
> Q. And at that time, Mr. Goodrich, it would have been a very easy matter, would it not, to have provided for a catchment at the bottom of that dump to obtain these waters without controversy or without any question, the waters from your dump, wouldn't it?
>
> A. No sir, it would not.
>
> Q. It would not?
>
> A. No sir, it would cost considerable money to have provided a catch basin.

Q. Wouldn't it have been a very simple matter in the railroad fill in Dickson Gulch to have provided a catchment?

A. No sir.

Q. Why not?

A. Cost too much money.

Q. What would it have cost?

A. Eight or ten thousand dollars.

Q. Eight or ten thousand dollars would not have been much to catch millions of tons or millions of pounds of copper, would it?

A. I don't think that is the way to figure values. That may be the way you figure but that is not the way I figure value."

* * * * * * * *

"Q. If placed in the B. & G. fill it wouldn't have been a very difficult situation, would it, so it would be immune from the shrinking and expanding operation of these dumps, that wouldn't have been a very difficult engineering job, would it?

A. Such a construction could have been put underneath the Bingham & Garfield Railway fill.

Q. What is that?

A. Such a construction could have been put underneath the Bingham & Garfield Railway fill.

Q. And could have been placed very near the dump?

A. Yes, quite close to the dump.

Q. Would have been very easy matter, then, to have taken this water down Markham Gulch and collected and retained all the water that could possibly come down Dickson Gulch from your dump?

A. It would cost money to do it. The most direct way to secure the copper solutions from the Utah Copper dump is to take them down Dickson Gulch as it is now and catch them at the catch basin at the toe of the dump, take them on through the pipe line, just as we have planned."

It will therefore be seen that there was no reason in the world why plaintiff should not at that time have taken the proper precaution to catch its solutions at the toe of its own dump. Surely an expenditure of eight or ten thousand dollars to catch hundreds of millions of pounds of copper was a slight consideration. Mr. Goodrich testifies again at pages 159-160 of the abstract that for eight or ten thousand dollars this catchment can still be put in. Mr. Crocker, eminent mining engineer, testified to the same effect and presented a complete plan for the catchment.

The only answer which counsel attempts to make to this proposition is that Mr. Earl had some doubts upon the subject matter. Who is Mr. Earl? He is a *mine* engineer (not a mining engineer). Mr. Earl was asked about himself to determine his qualifications to speak with reference to certain subject matters. He was a graduate of the L. D. S. High School (Tr. 65) and took two years of civil engineering at the University of Utah. He never took any courses in geology and never made a substantial study of it. He quit the University of Utah in 1904. He has done a little reading on leaching and precipitating plants, and (Tr. 66) has never made any substantial study of water and water courses beneath

the surface, or of rock strata and their composition, worked as helper on a survey party when he got out of the University, and finally worked himself up to transit man (Tr. 67); went to work for the Utah Copper Company in 1907, making surveys for railroad construction. His work was entirely along the line of surveying and about the only time he seems to have got out of it was when the leaching plant was built he seems to have been placed in charge of that operation, and also constructed two tracks of the railroad through the Bingham yards (Tr. 71). Again at Tr. 103-104, he was asked this question:

> "Q. I take it, Mr. Earl, since you do not claim to be a geologist, as you have stated, and have made no study of water and water courses, you would not feel yourself qualified to give any opinion as to the length of time that it would take water to percolate from the Utah Copper dump down to this catch-all?
>
> A. No sir.
>
> Q. Assuming that it would and come out and percolated—
>
> MR. PARSONS: What do you mean by catch-all?
>
> MR. RICH: Why this tunnel with its wing over there.
>
> A. No sir, I have not even thought of that, I had not, I had not thought about it and I haven't any opinion, I couldn't form any opinion on it.
>
> Q. You wouldn't feel yourself qualified to form an opinion?
>
> A. No sir."

This is the famous gentleman also who was personally in charge of and participated in the famous survey which was thrown out by the court for inaccuracy because the transit man took a shot which would have required seeing seven feet under ground.

Counsel for plaintiff would now state that the opinion of Mr. Goodrich, chief engineer of plaintiff, and of Mr. Crocker, eminent mining engineer, should be disregarded because, perchance, Mr. Earl thought there might be some question with reference to it.

The only question which was ever raised with reference to the possibility of the Utah Copper Company catching its water upon its own premises was the question of *cost*. Mr. Goodrich thought it would cost eight or ten thousand dollars and Mr. Crocker thought it would be nearer five thousand dollars. Undoubtedly with this depression on it could be done for about as much as the briefs in this case have cost on appeal.

We respectfully submit to this court that it never was a question of cost. They realized that the Hays Spring waters were already flowing upon defendants' premises and already had a substantial copper content. They wanted to obtain those waters, and they realized that they could not do so by catching the dump water at the toe of the dump because the Hays Spring waters were there before the dump was installed and had a substantial copper content before the dump was installed. Therefore, the only way to obtain the Hays Spring with its copper content was to obtain defendants' property.

On page 116 of plaintiff's brief complaint seems to be made that because Mr. Goodrich testified "at the early stages of the case" and admitted that it would be possible now at comparatively small cost to collect the copper solutions from plaintiff's dump at the toe of that dump and on the plaintiff's land, and because, as stated on p. 117 of plaintiff's brief "the defendants' proposal had not been made at that time", some allowance ought to be made for the testimony of Mr. Goodrich. This sounds almost as though the plaintiff were attempting to impeach its own witness; but the fact nevertheless remains that Mr. Goodrich testified (Ab. 160, Tr. 384-5) that a tunnel which "would divert all of the waters from the Utah Copper dump" could be constructed for "eight or ten thousand dollars". And there can be no dispute that Mr. Goodrich, whose eminence and authority as an engineer needs no testimonial, answered the following question with the following words (Ab. 160, Tr. 385):

> "Q. But for eight or ten thousand dollars you can produce such a catchment and receive the waters for the Utah Copper Company?
>
> A. I should say so."

COSTS

The court erred in awarding costs to plaintiff. Plaintiff contends that the court did not err in awarding costs to plaintiff because defendant perverted a true condemnation action in to an action to try title. In bringing this action plaintiff must be held to have brought before

the court all the issues which the law provides must be determined before the plaintiff is entitled to succeed. Sub-paragraph 1 of Section 7333, Compiled Laws of Utah 1917, provides:

> "CONDITIONS PRECEDENT TO CONDEMNATION. Before property can be taken it must appear:
>
> "1. That the use to which it is applied is a use authorized by law;"

That the use to which the tracts sought to be condemned in this action was such a use was necessarily in the case, and the burden on this issue was on the plaintiff. It hardly lies in the mouth of the plaintiff to complain regarding this matter.

An action in condemnation is a drastic one. It invades compulsorily the rights of the citizen in the interest of the larger welfare. The existence of a situation warranting the application of rights of eminent domain should be established beyond all question or the right becomes a wrong, and its exercise an arbitrary and unconstitutional abuse. There is no hardship in requiring that the plaintiff in an action in condemnation be required to pay that small portion of the costs permitted to be taxed in litigation of great expense and of vital importance. Certainly the welfare of the community and the interest of the public at large will be best served by making the condemnor pay the taxable court costs of every condemnation suit the defense of which is

conducted in good faith. The plaintiff gets the benefit of a drastic remedy. He certainly should comply with the constitutional provision that private property may not be taken without full compensation.

It developed very early in the action that the defendant contended that the plaintiff was not condemning land but was acquiring the title to the defendants' copper solutions. This was an entirely legitimate, proper and necessary contention. Of course, the plaintiff would have preferred that the defendant lie down on the only real issue in the case and submit, as it has repeatedly suggested in its brief, to the plaintiff's unobstructed progress; but the defendant did not care, and the law did not require it, to do this; and it does not lie in the mouth of the plaintiff to complain that this was not done. The plaintiff cannot say, "It is true, we brought an action in condemnation but you claimed it was in fact an action to acquire title and therefore we do not have to pay the costs of a condemnation action." Plaintiff's mouth is closed as far as this defense is concerned.

On page 123 plaintiff says: "The costs taxed were not incurred in ascertaining the amount of the compensation to which the owner was entitled by reason of the taking;" etc. True. The main question in this case is whether or not the plaintiff is by this action taking the defendants' copper solutions. The land itself without the solutions is of comparatively little value. But the question of whether the plaintiff was taking the defendants' solutions being the important question in the case, and

it being necessary for the plaintiff to succeed on this issue, and this being an appropriate issue in condemnation action, the plaintiff should, however the action may result, pay the costs of this action. Plaintiff has an idea that if plaintiff is successful in a condemnation suit that the fact of success relieves plaintiff from paying costs. Of course such is not the case.

That the question of title is entirely appropriate in condemnation suits is declared by our own court in the case of Ketchum Coal Co. v. District Court, 159 Pac. 737, in which the old firm of Dickson, Ellis, Ellis & Schulder represented certain of the parties and contended unsuccessfully that the issue of title ought to be settled outside of condemnation suits. After referring to a New York case, where, under the statute "condemnation proceedings are special and the proceeding comes before courts of general jurisdiction only in case when there is an appeal from the damages awarded to the land owner", the court says:

> "Under such circumstances every lawyer readily understands and appreciates why condemnation proceedings are not deemed proper to try questions of title, and therefore such questions must be tried in a court of general jurisdiction, and in case the dispute respecting the title arises between the condemnor and the condemnee the question of title must be determined in a proper court before the damages can be adjusted as between them."

The court, after referring to the fact that in certain

jurisdictions it has been decided that disputes as to title between condemnor and condemnee may be settled in condemnation proceedings, and in other states the issue as to title between *condemnees* may not be so tried, since such issue relates only to a distribution of damages and not to the right to condemn, the court says:

> "Among other cases in which it is held that disputes regarding the title to the condemned property may be determined in the condemnation proceedings we refer to the following: Chicago & M. El. Ry. Co. v. Diver, 213 Ill. 26, 72 N. E. 758; Illinois Cent. R. Co. v. Roskemmer, 264 Ill. 103, 105 N. E. 695; Chicago & N. W. Ry. Co. v. Miller, 251 Ill. 58, 95 N. E. 1027; Wilcox v. St. P. & N. P. Ry. Co., 35 Minn. 439, 29 N. W. 148; Gerrard v. Omaha, N. & B. H. R. Co., 14 Neb. 270, 15 N. W. 231; Dietrichs v. Lincoln & N. W. R. Co., 14 Neb. 355, 15 N. W. 728; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585."

The court then discusses the case of Chicago & M. El. Ry. Co. v. Diver, and then strangely refers to the "interesting" case of Los Angeles v. Pomeroy, as follows:

> "In City of Los Angeles v. Pomeroy, supra, Mr. Chief Justice Beatty, under a statute like ours, in his usual clear and vigorous style, points out that all questions relating to the title of the property that is condemned or is affected by the condemnation proceeding that may arise should be tried and determined in the condemnation action. And why may that not be done? It seems clear that our statute, which is like the one in California, contemplates that it should be done. Comp.

Laws 1907, sec. 3596, so far as material here, provides:

> " 'The court or judge thereof shall have power: * * * To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor,' and 'to determine the respective rights of different parties seeking condemnation of the same property.'
>
> "Again, under our statute an action to condemn lands is commenced, conducted, and tried in the same courts and in the same manner as all other actions affecting real property are tried. In view of the provisions of our statute it is not easy to understand why all issues arising in condemnation actions are not to be tried and determined in that action the same as is done in all other actions affecting real property."

It is interesting to note that costs of the proceedings in the Ketchum case were assessed against the party contending that the issue of title was foreign to a condemnation action, so the matter ought to be settled in this jurisdiction.

The question of whether or not the attempted use of the statutes of eminent domain is in fact a legal use, or, as our statute puts it "that the use to which it is to be applied is a use authorized by law", is always a proper issue. Our statute is the same as that of California. In 10 Cal. Jur., p. 303, Sec. 19, title "Eminent Domain", the text is as follows:

> "Unquestionably the owner of the land sought to be condemned may show that the use and its

> purpose are private and not public. And it is competent for the state, upon discovering the misuse of its authority whereby private property is being wrongfully taken for private use, to interpose by its attorney general to correct the abuse. The reasoning underlying this rule is, of course, that inasmuch as the plaintiff in proceedings to appropriate private property for public use purports to act as agent for the state, it necessarily follows that if the use is a mere private one the proceedings amount to an imposition upon the court before which they are had."

A number of cases are cited in support of the text, but, as it seems to us, the proposition is too manifest to require extensive citation.

On page 125 plaintiff cites the Colorado case of Haver v. Matonock, 75 Colo. 301, 225 Pac. 834. As we read the case it does not support plaintiff's contention in any respect. In Colorado, as in Utah, there are certain preliminary questions which must be decided by the court or by a commissioner before the question of damages is submitted to a jury. The court holds, as we understand the Colorado decision, that if a party fails to raise the preliminary questions before the court, he waives these questions, and if he later improperly injects them in the proceedings before the jury he is not entitled to his costs in presenting the issues after having by his conduct waived them.

A good explanation of the situation as far as the Colorado cases are concerned will be found in the case of Union Pac. Ry. Co. v. Colorado Postal, 69 Pac. 564.

We quote from pages 565 and 568:

> "Counsel for respondent contend that these several matters present prejudicial error, for the reason that petitioner had failed to prove that the property sought to be condemned was to be taken for a public use, or that there was any necessity for taking it. It is also urged that, in view of the issues made by the pleadings, the respondent had the right to introduce at the hearing before the commissioners the testimony refused, for the reason that such testimony tended to establish a state of facts from which it would appear the taking of the land in question was for a private, and not a public, use, and that there was no necessity for such taking. These matters might well be disposed of upon the ground that the law does not contemplate that commissioners in condemnation proceedings shall consider or determine such questions. On the contrary, they are to be determined by the court or judge, but, unless so presented for determination before the appointment of commissioners, or the right to do so is in some way reserved, they are waived. Section 1720, 1 Mills' Ann. St., provides that the court or judge may appoint a board of commissioners to ascertain the necessity for taking lands sought to be condemned. What propositions may be raised upon the question of necessity will vary according to the circumstances of each particular case. In this instance, however, so far as disclosed by the pleadings, or any matter discussed in the brief, we are of the opinion that the authority of the commissioners on that question would be limited to a determination of the one of quantity of land, or, more accurately speaking, the width of the proposed right of way sufficient to serve the reasonable physical needs of petitioner in erecting and maintaining its telegraph line. Ordinarily,

the authority of commissioners on the subject is so limited. In effect, this court has so decided in the recent case of Gibson v. Cann (Colo. Sup.) 66 Pac. 879. It was certainly never intended that commissioners should be required to determine questions the solution of which depends upon the application of intricate questions of law such as would be presented by the trial of issues tendered by the answer of respondent. This court has frequently decided, in cases where the question of damages in condemnation proceedings was submitted to a jury, that the only matter proper for the jury to consider was the one of damages, and that all other questions must be settled in limine. Irrigation Co. v. Davis, 17 Colo. 326, 29 Pac. 742; Thompson v. Reservoir Co., 25 Colo. 243, 53 Pac. 507; Siedler v. Seely, 8 Colo. App. 499, 46 Pac. 848; Colorado Fuel & Iron Co. v. Four Mile R. Co., 29 Colo. ....., 66 Pac. 902. On principle the same rule is applicable to the case at bar. The commissioners were appointed without objection on the part of respondent. There was no attempt upon its part to submit to the court the determination of any of the questions of fact upon which it relied to defeat the proceeding until after the report was filed. Respondent did not seek to prove that petitioner did not require the quantity of land sought to be condemned, nor by its pleadings was any such defense suggested. None of the matters above mentioned which respondent sought to submit to the commissioners were of a character which it was the province of that body to determine; and by the course pursued the right to have them determined by the court was waived. The reason for this conclusion is obvious. If, for any reason, the petitioner in condemnation proceedings is not entitled to exercise the right of eminent domain, or take a particular tract, these questions should be determined by the court in limine. If adverse to the petitioner, that is the

end of the proceeding. Irrigation Co. v. Davis, supra. In this connection we call attention to the case last cited. In that case the petitioner sought to have a right of way condemned through an already-existing ditch. It was held that, if the respondent desired to have the question of the feasibility and practicability of taking a right of way through such ditch determined, the question should have been referred to a board of commissioners appointed by the court, as the law directs. This holding, however, was based upon the provisions of sections 2261, 2262, 1 Mills' Ann. St., which provide that lands improved or occupied shall not, without the written consent of the owner, be subjected to the burden of more than one irrigating ditch constructed for the purpose of conveying water through such property to lands adjoining or beyond, when the object can be feasibly and practicably attained by uniting and conveying all the water necessary through such property in one ditch; and that, where it is necessary to convey water for the purposes of irrigation through the improved or occupied lands of another, the shortest and most direct route practicable upon which such ditch can be constructed shall be selected. These provisions, however, have no application to the case at bar. Neither were they invoked in Gibson v. Cann, supra. Both parties, however, appear to have treated the question of necessity as raised by the pleadings and testimony offered as being proper to submit to the commissioners, and for that reason we shall treat it as property presented for review."

We also call attention to the following additional Colorado cases:

Sand Creek Lateral Irrigation Co. v. Davis, 29 Pac. 742;
Lavelle v. Town of Julesburg, 112 Pac. 774.

In the case of Denver Power & Irrigation Co. v. Denver & R. G. R. Co., 69 Pac. 568, our question is discussed at pages 571-2.

Without quoting at length, the court holds that a dispute *between the condemnees* as to title is not a proper defense because it in no way qualifies or affects the right of the condemnor to take the property but only concerns between whom the amount which the plaintiff must pay shall be divided. This limitation of the doctrine that a suit in condemnation may not be turned into a suit to quiet title as between the condemnees is perfectly intelligible, and it is also understandable that an ordinary suit to quiet title may not be pursued under the guise of proceedings in eminent domain because such proceedings imply an admission on the part of the condemnor that the condemnee is owner of an interest which the condemnor seeks to obtain by proceedings in eminent domain, otherwise the proceedings have no basis, but the question of the extent on character of the title or ownership of the condemnee is always material and pertinent. But, we respectfully suggest, the question of whether or not the condemnor is not attempting under the guise of condemnation to promote a private and not a public purpose, or the question of whether or not "the use to which it is to be applied is a use authorized by law", as our statute phrases it, is always in the case. The Colorado case, to our mind, is directly in point on this phase of our controversy. The court in the Colorado case says that as between two persons, both of whom

desire to accomplish the public purpose, the courts will not permit one to condemn the land of another, otherwise there would be no end to condemnation proceedings. The court says:

> "So far as the authority to exercise the right of eminent domain for public uses is concerned, it is based upon the theory that the property granted the subject is upon the condition that it may be retaken to serve the necessities of the sovereign power (Mills, Em. Dom. Sec. 1; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015), and to this end agencies created by the state, the purpose of which is to serve the public, may exercise this right. Where, however, land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their needs, or supply their necessities, the taking of such property became necessary. Unless so limited, no rule governing the rights of those engaged in conducting a business for the benefit of the public could be formulated which would afford them protection against others desiring to also engage in the transaction of a public business. While corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises, inaugurated for the benefit of their stockholders; and if one such corporation may take the property of another so as to deprive the latter of the use to which it is devoted, except public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent

> domain might be exercised. Without the limitation suggested, the most absurd results could follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum. Lake Erie & W. R. Co. v. Board of Commissioners, supra. The taking of property already devoted to a public use to an extent which wholly defeats such use, for another public use, cannot be justified when it would merely result in a change of ownership, without in any manner tending to meet or serve the exigencies of public needs, or where the change of ownership would become a mere matter of private concern. Chicago & N. W. Ry. Co. v. Chicago & E. R. Co., 112 Ill. 589. In the circumstances of this case neither comparative convenience, benefits, nor cost to the respective parties can be taken into consideration."

In quoting from the case of Haver v. Matonock, at page 125 of plaintiff's brief plaintiff has omitted what, to us, is the important part of the decision under the Colorado proceedings. We quote from the case commencing at the second column, p. 834:

> "We cannot hold that the question of necessity involves the question whether there is any water in existence which petitioners can use. To so hold would be to allow the commissioners, whose sole function is to determine the necessity for the taking to determine questions of priority of appropriations of water, and, in this case, to determine the extent to which the several parties concerned in this proceeding may use waters from the Matonock spring or any waters found in the 'Zorn arroyo', if such arroyo exists. It was not the duty of the commissioners, appointed in this

> case, to pass upon such questions. Their duty, under the order and the instructions of the court, was solely to determine the necessity of the plaintiffs' proposed ditch and pipe line for the intended use; not whether the plaintiffs had any right to the use intended, nor whether the intended use could ever be consummated. The question of necessity does not involve the right to condemn, nor whether plaintiffs could ever make use of the property sought to be condemned if they obtained it. The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended."

It will thus be noticed that the court does not hold that if the proposed condemnor had no water which could be used through the pipe line proposed to be laid across the land of the condemnee, such question would not be proper in condemnation proceedings, but that such question is not properly before the commissioners appointed by the court to determine the question of "necessity"; "necessity simply involves the necessity of having the property sought to be taken for the purpose intended" and not the question of whether or not the condemnor could use the right of way sought to be condemned. Certainly this question has no application in our case. Here the question raised was whether or not the "use" was one authorized by law, whether under the guise of condemning land the plaintiff did not in fact propose to engage in mining and take from the land of the plaintiff without paying for it the mineral values therein contained.

The case of Gibson v. Cann, 66 Pac. 879, is referred to in the Haver case. In that case the court held that in proceedings "for the purpose of condemning a right of way for a ditch and reservoir sites across and on the land of appellee" the court would not inquire "whether the enterprise is practicable or can be made a success financially that these questions are not properly a matter of legal necessity; nor is it pertinent to inquire what petitioner may be able to accomplish in the way of obtaining water which can be utilized through his proposed ditch and reservoir system." We need spend no time on the distinction between the situation in this Colorado case and the case now before the court. The question raised by the appellant in the trial court was whether or not the plaintiff was not asking the court in permitting the use of plaintiff's land under the guise of a condemnation proceeding to acquire the plaintiff's copper solutions without paying for them.

The Haver case also refers to the case of Schneider v. Schneider, 86 Pac. 347. The plaintiff sought to condemn a right of way for a ditch "extending from the lower end of a certain irrigation ditch upon defendant's premises to plaintiff's premises." It was objected that "the appropriation, whatever be the volume or origin of the water, must attach directly or indirectly to some natural course or channel." The court says, "He (the condemnee) cannot raise a question that does not concern him or which rests solely between petitioners and other appropriators." The court also says: "As to

whether or not there is sufficient water for plaintiff's use, or as to whether or not the plan is a practical or feasible one is a matter which cannot be determined in a proceeding of this character." The court also holds that there is no merit to the contention "that no easement can be acquired for a ditch until the right to the use of the water shall have become vested." It seems to us quite apparent that the situation in the case of Schneider v. Schneider is entirely different to that now before the court. Here the question was directly within the provision of the statute which provides that the court must determine whether or not the "use" intended is one permitted by law. The real question in this case is whether or not plaintiff under the guise of condemnation is attempting to confiscate the mineral values belonging to the defendant.

Plaintiff cites the case of Public Service Co. v. City of Loveland, 79 Colo. 216, 245 Pac. 493, on p. 127 of its brief. The City of Loveland brought an action to condemn for public purposes an electric light plant belonging to the Public Service Company. The court held in that case that the question "concerning the claim that there was a misappropriation or improper diversion of public funds by city officers" was not proper, and that the eminent domain proceedings could not be converted "into a trial for alleged misfeasance or malfeasance of municipal officers". These remarks concern an attempt by the electric light plant owner to defend against the condemnation proceedings on the ground that the funds

for the purchase and those for construction of the electric light plant should be kept separate, which it was claimed was not done. The court holds that such an issue is improper, citing, among others, the case of Shields v. City of Loveland, in which it was held that "questions of municipal bonds and the rights of holders thereof" could not be injected into a condemnation case, among other reasons, because "such parties are not before the court." We cannot see how these manifestly foreign considerations are in any way analogous to the issue in the present case as to whether or not the plaintiff is not in allegedly attempting to condemn a right of way actually appropriating, without paying for it, copper solutions of the defendant.

On page 127 of its brief plaintiff cites Truckee River General Electric Co. v. Durham, 38 Nev. 311, 149 Pac. 61. In this case the court holds: "If the demand is so unreasonable as to justify a fair-minded person in litigating the question, small consideration should be paid to his request for judgment for the costs which accrued after the filing of the answer in the case." And then a sentence follows in the opinion which shows that the statement of the court is purely dicta. This sentence is omitted from the quotation by appellant: "Since the case must be tried anew, we will make no order as to costs." We know nothing about the statutes in Nevada relating to costs in condemnation suits, but in any event, we are perfectly willing that the court shall consider whether or not the defense made in this case is "so un-

reasonable'' that it will shock a fair-minded person, and to determine our right to costs from such consideration.

On page 128 counsel reiterates its assertion that in this action the defendants have settled a fictitious claim for damages in the sum of $200,000.00 and upwards for $500.00, the amount offered prior to the institution of the suit. We have heretofore discussed this charge and shall content ourselves with referring the court to page 17 of this brief where the matter is considered.

On page 130 respondent cites the case of In re Courtland, etc. Horse Railway Co., 98 N. Y. 363. (The page citation is in error. It is found at page 336). This case is cited on the proposition that costs may be awarded either the plaintiff or the defendant under the New York statutes applicable to special proceedings. The case is one in which a railroad company attempts to condemn a crossing over the track of another company. Respondent in quoting the decision of the court on page 131 leaves out the most important part. This part distinguishes the case cited from the present one. In the present case we are contesting the right of the plaintiff to condemn. In the case cited the right to condemn is admitted and the only question was as to the necessity of taking a particular piece of land, and this question was to be determined by commissioners under the New York practice in such matters. This case holds that the matter of one railroad crossing another is governed by a special statute and, as is said in several other New York cases, such an action is not strictly a proceeding in eminent domain.

On the latter point we cite the following cases:

In re Limi & H. F. Ry. Co., 22 N. Y. S. 967;
Buffalo B. & L. R. Co. v. New York L. E. & W. R. Co., et al., 25 N. Y. S. 265;
Hornellsville Elec. R. R. Co. v. N. Y. L. E. & W. R. Co., 31 N. Y. S. 745.

We also wish to refer to the case of New York West Shore & Buffalo Ry. Co., In re Walsh, 94 N. Y. 287. We quote from pp. 294 and 295, as follows:

> "In the present case the costs allowed are small compared with the amount of the award, which was $35,500, but that can make no difference in the principle. If the company can recover against the land-owner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small; and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole of the award. There is no warrant in the statute for awarding such costs, and if there were, it would be a violation of the constitutional right of the land-owner."

As further evidence that crossing cases in New York are treated as sui generis, we call attention to the fact that the Walsh case is referred to in the Courtland case. We do not believe that there is any reason in the attempted distinction made by counsel between the two cases. It is not the law that the land owner is only entitled to his costs in the action for determination of damages and is denied his costs in an action where he resists

the right of the plaintiff to condemn. An eminent domain proceeding is logically divided into three parts: (1) The determination of the right to condemn. Under this part, questions of public use, the authority of the plaintiff and conditions precedent to the exercise of the right are properly involved. (2) Necessity. Under this part questions of the need of a particular track or method of accomplishing a particular result are to be considered. (3) The question of damages. It should not be the law, and it is not the law, that the land owner can recover his costs expended under the last heading only.

Cases holding that the land owner can recover his costs expended in denying the right of the plaintiff to condemn are the following:

San Joaquin & Kings River Canal & Irr. Co. Inc. v. James J. Stevinson, et al., 132 Pac. 1021;
Yolo Water & Power Co. v. Edmunds, 205 Pac. 445.

Respondent further cites two cases holding that the condemning party may be allowed his costs on appeal when the property owner appeals. We are appealing from the decision of the lower court which awarded the costs of the trial to the plaintiff, and up to the present time we have no quarrel with the rules of law enunciated in the cases cited by respondent on page 132 of its brief; in fact, the pronouncements of the California court in the case of City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468, as to costs on the

trial meet with our entire approval. The court in that case recognizes and enunciates our position on the matter of costs as clearly as it may be done. We quote from p. 469 as follows:

> "It is settled law in this state that, in view of the provision of section 14 of article 1 of our Constitution that 'private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner,' the owner whose property is thus sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the plaintiff; for to require him to do this would reduce the just compensation awarded by the jury by a sum equal to that paid by him for such costs. This was held to be the rule as to the costs in the superior court in the case of San Francisco v. Collins et al., 98 Cal. 259, 33 Pac. 56, where the trial court, following the provisions of section 1255 of the Code of Civil Procedure, had apportioned such costs between the parties on adverse sides. Said section 1255, specially applicable to actions in eminent domain, provided, as it still provides, that:
>
> > " 'Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.'
>
> "It was held that this section was limited in its effect by the provision of section 14 of article 1 of the Constitution, hereinbefore set forth, and the order of the superior court was reversed. It is not questioned that this ruling was in accord with the decisions in other states, and its correct-

> ness has never been doubted. In San Joaquin & Kings River, etc., Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021, it was held that on a successful appeal by the party seeking to condemn, the judgment in favor of the owner being reversed, the constitutional provision precluded the recovery by the party seeking to condemn of its costs of appeal. This ruling was in accord with the overwhelming weight of authority in other jurisdictions, and we see no reason to doubt its correctness."

The other case cited by respondent on page 132 of its brief is from the State of Washington, and since submitting our brief on this question the case of State v. Superior Court of Walla Walla County was decided by the Supreme Court of Washington. The report of this case may be found in 9 Pac. (2d) 70. We quote from p. 71 as follows:

> "Our Constitution, art. 1, sec. 16, prescribes that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner. Under this provision of the Constitution it has been held from an early day that the land-owner must not be put to the expense of litigation in order to preserve his constitutional right to have the amount of damages determined by a court in a proceeding to which he is a party. Adams County v. Dobschlag, 19 Wash. 356, 53 P. 339; Little v. King County, 159 Wash. 326, 293 P. 438."

See also Keller v. Miller 165 Pac. 774 and cases cited therein.

On page 129 counsel says: "Determination of title to the copper solutions was not a necessary incident of this suit—no more so than an inquiry into the precise nature of plaintiff's title in or to its dumps in Dixon Gulch, nor into the many other matters the courts have excluded from consideration in condemnation suits." If the only question at issue in this case had been the title of plaintiff to plaintiff's dumps in Dixon Gulch, there would have been no law suit. We are not concerned in any way with that title. This action, however, did concern certain copper solutions *not in plaintiff's dump* but on the premises of the defendant, and the whole question is whether or not, because plaintiff owns certain dumps west of Tract D it also owns certain copper solutions appearing in Tract D. Certainly if the copper solutions are owned by the defendants, the plaintiff had no right to condemn Tract D and capture these copper solutions. The purpose of this action was to capture copper solutions on Tract D, and all the issues raised have been directed to the question of whether or not this was a "use" of Tract D such as is "authorized by law". That issue is expressly made one of the preliminary ones before the court in condemnation proceedings. None of the cases cited on page 129 by plaintiff in which the courts have excluded extraneous issues from proceedings in eminent domain have the remotest resemblance to the issues in this case.

The case of In re City of Cedar Rapids, 85 Iowa, 39, 51 N. W. 1142, is a case where the owner of property

attempted to set up the fact that the city had no funds with which to pay for the land taken. It was held that this question did not affect the City's right to bring the action because payment in full would have to be made before the City could take the property.

The case of Mercer County v. Wolff, 237 Ill. 74, 86 N. E. 708, is a similar case in which it is held that whether or not a county has sufficient money to build a jail is not a proper matter to be considered in condemnation proceedings.

The next case cited by respondent is the case of City of Chicago v. The Sanitary District of Chicago, 272 Ill. 37, 111 N. E. 491. This was an action by the City to condemn an outlet for a sewer. The defense was that the money for the condemnation action was furnished not by the City but by the Union Station Company. It was held that this could not affect the City's right to condemn since there was a contract between the City and the Union Station Company whereby the City had agreed to accomplish the changes which were sought in the action if they were found to be necessary.

In the City of Dallas v. Hallock, 44 Ore. 246, 75 Pac. 204, the objection raised was that the City after purchasing the property intended to pay the builder by making it a lessee of the waterworks to be constructed on the land condemned and allowing the builder as such lessee to collect tolls for a term of years. It was held that this was no objection to the action because the de-

fendant was neither a resident nor a taxpayer of the City and certainly did not affect the City's right to condemn.

Similarly, in the case of State ex rel. Thomas, v. Superior Court of Whatcom County, 42 Wash. 521, 85 Pac. 256, the owner of the property sought to defeat the condemnation action by pleading that the City had exceeded its right to incur debts. This was held to be no defense to a condemnation action.

In the case of Tennessee Coal, Iron & R. Co. v. Birmingham So. R. Co., 128 Ala. 526, 29 So. 455, the owner of the land sought to defeat the right to condemnation on the ground that the railroad company which was attempting to obtain ground for a branch road had not filed a resolution of its board of directors with the secretary of state authorizing it to do so. It was held that this was only a matter of importance to the stockholders of the corporation and of no legitimate concern to strangers.

City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287. The objection raised in this case was that one of the trustees of the City had filed the petition which was presented to the board requesting condemnation of the land for construction of an alley. It was held that this objection could not defeat the plaintiff's right of action so long as there was a quorum without that trustee.

Richland School Tp. of Fulton County v. Overmyer, 164 Ind. 382, 73 N. E. 811, is a case where the objection

to the right to condemn was that land was going to be applied to a different use than that for which the action was commenced, and also that a less quantity of land would be sufficient or that another location would be more convenient. It was held that these objections could not defeat the right to condemn.

The court says:

> "It was not competent in this proceeding to introduce evidence tending to show that the property was to be applied to a different use than that for which it was appropriated. The property thus acquired could only be used for the public purpose for which it was obtained under this statute."

Kansas & Texas Coal Ry. Co. v. Northwestern Coal & Mining Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936, was a case where the chief objection was that a railroad was seeking to build a branch line for the sole purpose of developing coal lands owned by the railroad. The court held the use was public because the railroad could be required to carry passengers or freight for anyone desiring to use it.

Caretta Ry. Co. v. Va.-Pocahontas Coal Co., 62 W. Va. 185, 57 S. E. 402, is a case where the owner sought to defeat the right of a railroad company to condemn land on the ground that the proposed route was through a mountainous and sparsely settled country and that only a few people would be able to use the road for the purpose of transporting freight or for passenger ser-

vice. This was held to be immaterial on the question of the right to condemn.

It will be seen that while all the cases cited by the respondent held that the questions attempted to be raised were not competent and were not determinative of the right to condemn, that none of the questions attempted to be raised are analogous to the question in this case. At any rate, plaintiff allowed the question of title to be raised in this action and without objection, and admitted that if the waters on Tract D had been found to belong to the defendant that this action would have been dismissed (Respondent's brief, p. 8) (Ab. .....), and also plaintiff has stated that it could not in this action condemn any of defendant's waters, and further that it was not attempting to do so.

CONCLUSION

In this case plaintiff is attempting to lift itself by its boot straps. The only argument made by plaintiff as to its right to collect water in catchment C is that it is given such right by the order of occupancy on June 13, 1928. Nothing antecedent, nothing other than this order, is suggested as the basis of plaintiff's right; in other words, the order which is part of these proceedings, the issuance of which and all rights under the same, the order that is brought before this court on this appeal; the determination of the effect of which is the very purpose of the appeal, is the only consideration on which plaintiff stands in an effort to uphold that order and the

proceedings based thereon. This order was made "without prejudice" and only "pending the action", and has no legal efficacy in conferring any affirmative rights on the plaintiff. The plaintiff asserts that the order of occupancy gives it its right to capture copper solutions in catchment C. This could only be true if the order could not be appealed from. If it were final and once having been entered could not be reviewed, plaintiff's position might be correct, but the order is reviewable and plaintiff is accountable for its occupancy, and whether or not plaintiff obtains any right by the order is the very subject of this appeal. The order entered was "without prejudice" to existing rights, conveyed nothing, granted nothing, was temporary, was to be in force only until the rights existing prior to the order itself could be determined. The whole purpose of an order of occupancy pending the action is to preserve the status quo of the parties until final determination of their rights and, in the meantime, at the peril of the condemnor, to permit condemnor to proceed according to his claim of right. The order, however, confers no rights and extends no immunity. The occupant cannot be charged with being a trespasser, but he must respond for every element of damage done by him while in possession. The condemnee can lose nothing by the order.

Plaintiff lays great store upon the fact that the late Honorable Morris L. Ritchie commenced the trial of this action and passed upon a motion for a nonsuit. We have no desire to rob plaintiff of any weight to be attached to

this fact; but considering the seriousness of the issues involved here, both as to questions of law and as to the amount of damage, it may be that the overruling of a motion for a nonsuit in the midst of a trial is not entitled to very great weight. The case was never completed before Judge Ritchie and he never had an opportunity of passing finally upon its merits. As to the action by his Honor, Judge McDonough, we desire only to say that it took Judge McDonough a long time to reach a decision in this matter, and does not indicate any ease in arriving at the conclusion finally reached.

UNLESS PERMITTED TO CONDEMN DEFENDANT'S PROPERTY PLAINTIFF WILL HAVE "ABANDONED" THE COPPER SOLUTIONS.

On page 133 plaintiff admits that "Plaintiff's condemnation sought by this action" is for the purpose "to avoid * * * an abandonment". In other words, before the condemnation proceedings plaintiff realized it had lost such copper solutions as came from its dump and title to such copper solutions passed upon reaching the western boundary of the appellant's land to the appellant, otherwise why these proceedings. The purpose of this action is to prevent such an abandonment by acquiring defendants' property. The word "abandonment", as we have heretofore argued regarding the words "convey", "carry", "transport", is a dangerous word. It implies volition where no volition exists. It is one of the characteristics of water that title is lost

without volition on the part of one having such title as may be had to water. In this case the plaintiff can acquire title only by collecting its copper solutions on its property; it has no title at any other place. It does not "abandon" title except in the sense that it loses title when the waters pass from plaintiff's property, and defendant does not "acquire" title as far as any volition on the part of appellant is concerned when the waters pass across the western boundary line of appellant's premises. The only change as far as the water is concerned is that while on the plaintiff's property the plaintiff has the right to capture and control the waters and when the waters reach the defendant's property the defendant has an equal right. The right to capture foreign waters which will come onto the defendant's land is a present right to future enjoyment. This right is an existing, continuing right. It may not be acquired by plaintiff without the consent of the defendant. We know of no provision of the statutes of condemnation which would permit the plaintiff in this case to acquire now without compensation the copper waters which have come upon the land of the defendant nor the *present right* of the defendant to such waters as may in the future come into the land of defendant from whatever source they may come.

Plaintiff also says, on p. 133 of its brief: "If plaintiff be permitted to condemn, plaintiff's solutions will be saved to plaintiff, not abandoned by it. In their effort to defeat the condemnation and thereby accomplish the

abandonment defendants require, defendants assume the abandonment the maintenance of this suit will avoid, a false assumption upon which defendants attempt to erect a defense." If plaintiff will listen with plaintiff's reasoning faculties after reading again the foregoing, plaintiff may hear with unmistakable vividness the fall of the unsubstantial legal structure attempted to be erected by the plaintiff. In other words, plaintiff admits that if it were not for these proceedings, all waters coming from the plaintiff's dump would now be abandoned as all waters prior to the order of occupancy "pending the action" and "without prejudice" had been abanoned, and admits that it was the passing of the waters onto the premises sought to be condemned that constituted their abandonment by plaintiff and the acquirement of title by the defendant. Plaintiff has also admitted repeatedly in its brief that plaintiff can acquire no water by this action, title to which is in the defendant. The waters still cross the western boundary of the land owned by the defendant and will continue so to do in all likelihood for many years to come. The decree of no court can stop their coming, and as inevitably as they come the law pronounces upon them the ownership of the defendant. This ownership the plaintiff cannot and declares it does not seek to acquire. All plaintiff on its own admission attempts to do by this action is to prevent an "abandonment". This plaintiff cannot do. No law of condemnation can repeal the law of gravitation, or that fundamental principle of the law of property and water, that water, because of its migratory character, must be

captured in the land belonging to the plaintiff before it belongs to plaintiff in any final sense; that when it leaves the land of the plaintiff, plaintiff cannot follow it for the simple reason that it would, in attempting to follow it, be seeking not its own but that which belongs to another.

BY THE ORDER OF OCCUPANCY "PLAINTIFF'S BOUNDARY LINE WAS, PENDING THE ACTION, EXTENDED ACROSS TRACT D TO AND INCLUDING PLAINTIFF'S INTAKE".

Plaintiff says: "Pending the action the copper solutions have been saved from abandonment by order of court putting plaintiff in possession for the purpose of conveying plaintiff's copper solutions across Tract D to and into plaintiff's intake, by which order plaintiff's boundary line was, pending the action, extended across Tract D to and including plaintiff's intake." We recall someone saying, we think it was a United States senator, that it was the intention of our country to pick up the boundary line between the Republic of Mexico and the United States and carry that boundary far into the heart of Mexico. It was a rather boastful declaration; but nations are powerful and boundary lines are subject to strange movements when appeal is made to a jurisdiction in which there are few laws and no courts and where the final arbiter is the sword and the only law is that written by force. We wonder if the plaintiff feels that it is above law and by its uncontrolled will capable of twisting both law and justice to the accomplishment of

the moving of the boundary that on June 12, 1928, separated the appellant from those who owned the land immediately to appellant's west. We are quite sure, unless that was accomplished in law and fact which plaintiff says was accomplished, to-wit, "plaintiff's boundary line was, pending the action, extended across Tract D to and including plaintiff's intake", plaintiff has no hope of success in this action. Did the order of June 13, 1928, entered "without prejudice" and only "pending the action", pick up the west boundary line of the defendant's property and twist it into the contortions of Tracts A, B, C, and D? No. The law, out of its desire to promote certain general interests of the community, has authorized the taking of property belonging to a private individual for certain public uses and until all issues raised as to whether or not an alleged effort to apply such law is one which in fact comes within the statute, permits the party claiming the benefit of the operation of the law to go into possession; but just as certainly as the party claiming to be within the provision of the law has the right, before all issues involved in an attempt to apply the law have been determined, to enter into possession, such temporary occupant must render an account of his acts while in possession, if it is finally found that it was mistaken in claiming it was right in the institution of the proceeding. If, pending the action, the plaintiff could by the institution of

proceedings to condemn the land of the appellant acquire those lands for collecting copper water, and the court in deciding later that the appellant was wrong could not compel the appellant to account for its actions during its occupancy, all plaintiff would have to do would be on the day of the decision in the present case that the plaintiff was wrong in the institution of its suit in June, 1928, to refile another action, put up a bond "without prejudice", "pending the action", and reoccupy the premises of the defendant, and when defeated in a second suit, commence a third suit, and continue on throughout all time collecting the copper solutions belonging to the defendant. Or it may be that the real import of plaintiff's words is even stronger than the foregoing. If plaintiff is right, all plaintiff would have to do on the trial of an action in condemnation would be to prove that an order had been entered "pending the action" and "without prejudice" and the trial would be stopped, judgment pronounced for the plaintiff, and everybody would take their hats and go home. There would be no danger in putting up a bond, according to plaintiff's theory, because there would be no duty to account. The bond would be one of those amusing incidents of the proceedings which enlivens the conduct of a trial as portrayed in light opera. We are quite certain that all the twisting of the boundary by the order of occupancy "pending the action" and "without prejudice", entered

on June 13, 1928, occurred in that part of the anatomy of counsel for plaintiff which is usually thought to be devoted to the processes of reasoning, and has no other existence.

Respectfully submitted,

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